VOLUME II

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 488

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

CHICAGO STOCK YARDS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 28, 1942
CERTIORARI GRANTED DECEMBER 7, 1942

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3730.

CHICAGO STOCK YARDS COMPANY,

PETITIONER FOR REVIEW,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS.
DECISION, MARCH 29, 1941.

RECORD ON PETITION FOR REVIEW.

VOLUME II.
Pages 575 to 900, inclusive.

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BOSTON:
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1942.

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[Title omitted.]

SIXTH DAY.

REPORTER'S MINUTES.

[Filed February 9, 1939.]

Hearing at Washington, D. C., on the 6th day of February, 1939, at 10 o'clock a. m.

The hearing in the above-entitled proceeding was resumed on this the 6th day of February, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted.)

PROCEEDINGS.

Mr. Clark: Mr. Merriman, will you take the stand, please?

MR. NORMAN MERRIMAN

called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Clark). What is your full name? *A.* Norman Merriman.

Q. 2. Where do you live? *A.* Englewood, N. J.

Q. 3. Where were you educated? *A.* Lehigh University, graduating in the year 1905 with a degree of Bachelor of Arts, and took one year post graduate work at the University of Michigan.

Q. 4. Now, after taking that course at Michigan, what have you done, tracing down through the years? *A.* In 1907 to early 1908, I was associate editor of a monthly

magazine called the Engineering Digest, and in the year 1908 I left that magazine and became associated with the firm of A. W. McLaughlin & Company, in New York City, who were brokers and dealers in real estate mortgages.

In 1909 I became associated with the investment brokerage house of Shelden & Shelden, which later became the firm of Shelden, Morgan & Company, first as a customers' man and then later as manager of the investment department of that organization. In that capacity, I had general charge of investigation of securities that were inquired about by the members of the firm or by the customers of the firm, and I passed on the bulk of the firm's participation in syndicates.

In 1916 I went with the investment department of White & Company of New York, an investment banking house, and with that firm my work was being in general charge of the distribution of security issues originated by that firm as well as acting in an advisory capacity with respect to the security issues which they originated.

In 1917 and 1918 I became manager of the bond department of Brightung & Company of New York City, and there I had charge of the distribution of securities as well as acting in an advisory capacity with respect to the securities which they issued.

For the next two years I was manager of the bond department of Bolster & Company of New York, in which capacity I had charge of the sales organization which distributed securities, and I did all of the buying of securities for the firm's own account, having the discretionary power to buy open market securities and new security issues in sums ranging up to $100,000 to $250,000.

Mr. Welch: I did not get that.

The Member: Read that, Mr. Reporter.

(The record was read.)

The Witness: And in 1921 I opened my own office to un-

dertake the financing of the largest size industrial companies, and continued in that business, operating at the same time in both securities and real estate in my own account until 1927, when I was offered a position to organize the statistical and research departments of the New York Stock Exchange firm of Samuel Ungerleider & Company, which had offices in New York and five or six cities outside. In that capacity I investigated virtually all of the securities which that firm contemplated underwriting. I conducted the research that was necessary for the giving of advice to clients as to buying and selling securities.

In 1929 that firm organized an investment trust called the Ungerleider Financial Corporation, and I became secretary of that corporation, which started out with an initial capacity of approximately twenty million dollars.

I was a member of that corporation's investment committee, and in that capacity I had general charge of its open market transactions in securities, and had at times discretionary power to buy or sell securities owned by the corporation, in sums of a million dollars or thereabouts.

In late 1930 or early 1931 that corporation passed under the control of the Atlas Corporation, a very large investment trust which had acquired the largest single block of stock outstanding and had acquired substantial other blocks in the open market, and it assumed control, and I resigned as secretary of the corporation some time in 1931, continuing as I have all during this time with Samuel Ungerleider & Company in my capacity in charge of their statistical and research departments.

In December, 1931, the firm Samuel Ungerleider & Company merged with the firm of Fenner & Beane, becoming the firm of Fenner, Beane & Ungerleider, and I became affiliated with that house, which was then one of the two or three largest commission brokerage houses probably in

the world, certainly in the United States. My work with that firm was largely advisory in character, relating to the investment policies of certain firm members and certain important clients of the firm.

In 1934, in March of '34, I resigned to open up my own office as investment counsel and consulting economist, and have maintained my offices at 67 Broad Street from that time down to the present.

Q. 5. You are speaking of New York City? *A.* Yes, sir.

Q. 6. Have you done any writing along the lines which would apply to your experience and training? *A.* Yes, sir; I have written a great many articles for financial publications of all types and for newspapers, beginning in 1914 or '15 with a long series of articles I contributed to the Magazine of Wall Street, some of them dealing with valuations and principles of valuation, particularly certain articles which pertained to the valuation of special war profits that were being obtained in 1916 and '17 by a great many American industrial companies, and I have written articles for the Bankers Magazine, Forbes Magazine, Money, Markets, and Investments, and numerous other publications in the financial field.

Q. 7. Have you lectured on financial topics? *A.* I have been invited to lecture on financial topics by the American Statistical Association, by Columbia University, Princeton University, College of the City of New York, and by various civic organizations in and around New York City.

The Member: Have you accepted the invitations?

The Witness: Yes, sir.

Q. 8. (By Mr. Clark). Have you at any time been employed as a valuation expert? *A.* Yes, sir. During the past 10 years I have been employed as valuation expert on a considerable number of occasions, and have appeared as a witness on valuation matters before the United States.

Board of Tax Appeals, before federal courts in several different circuits, and before certain State courts. I have—

The Member: Well, you have appeared as a witness in proceedings before this particular division of the Board of Tax Appeals, haven't you?

The Witness: Yes, sir. I appeared before Your Honor about a year ago.

The Member: You have appeared several time before me, have you not?

The Witness: I think I have appeared two or three times before you. The last case that I remember was the one involving the value of the Emerald Coal Company stock in which I appeared as a witness.

The Member: The Pittsburgh case?

The Witness: Yes, sir.

The Member: I only wanted that to show that the witness is not new to me in his performance; that you will both be aware of the fact that I have seen him before.

Q. 9. (By Mr. Clark). Had you finished with your answer? A. Those valuation studies that I have made in connection with court testimony or matters involved in litigation have involved a very wide variety of companies including banking, public utilities, miscellaneous types of industrial business, and for the past eight months I have been retained by the New York Central Railroad, by the Lehigh Valley, Delaware, Lackawanna & Western, the Erie Railroad, the Central Railroad of New Jersey, and the New Jersey and New York railroads to value their properties in the State of New Jersey, which operation has necessitated the valuation of the systems themselves, the railroad systems, themselves, in order to allocate a portion of the value to the State of New Jersey.

Q. 10. Have you done any work as a compiler? A. Well, I was the original—originator of a weekly business index,

which I believe was the first weekly business index compiled in the United States, on which I began work in 1929, while I was in the Ungerleider financial organization, and that index was published for a number of years by the Daily Investment News, in New York City, and it is still compiled by me.

Q. 11. State a few of the major valuation cases in which you have been employed by the Department of the Treasury or the Department of Justice.

The Member: May I ask, in connection with the last answer given, does your index have a title? — Is it known by any name?

The Witness: It is known as the Merriman Business Index.

The Member: Now, if you will answer the question Mr. Clark has put to you.

The Witness: What was the question again?

(The last question was read.)

Mr. Clark: Well, perhaps "retained" would be a happier word. I will change the question to make it "retained" instead of "employed."

A. I was retained by the Treasury Department in the case of the Amerex Holding Corporation, which involved the valuation of a large amount of Chase Securities Corporation stock. I was retained in two cases involving the value of the Christiana Securities Company and the Delaware Realty & Investment Company, both of them large holding companies. I was retained in the A. W. Mellon case to value the stock of the McClinton-Marshall Construction Company. I was retained in the Tex-Penn Oil Company case, and in the Cecil H. Gamble case, involving the value of stock of the Procter & Gamble Company. I was retained last year in the matter of the Maytag Company case, and the prior year, to the Fulton Sylphan case, that

is, the security involved. The case, I believe, was Henry Hudson v. Commissioner. I was retained by the Government in the Daniel Guggenheim Estate case, which involved the valuation of $25,000,000 of open accounts and a million shares or more of the stock of the Anglo-Chilean Nitrate Corporation. I was retained in the case of—I believe the title of the case was the Western Power Company, but I am not certain of that. The valuation involved approximately a hundred and fifty million dollars of stock of the Pacific Gas & Electric Company.

Is that sufficient? I can give you some more.

Q. 12. (By Mr. Clark). I think that would be sufficient, Mr. Merriman.

The Member: Well, let me ask you: You say you were retained by the Government in those cases. Did you, in fact, actually testify in open hearings in those cases, or did you merely advise Government agencies?

The Witness: I testified in all of those cases except in the Amerex Holding case, in which case the Government rested after the Petitioner had put in its case. All of the other cases I have testified in, and perhaps fifteen or twenty more.

Mr. Clark: Do you wish to cross-examine on the qualifications?

Mr. Welch: It doesn't seem so. I don't know what you are offering him on yet. What is the offer?

Mr. Clark: He is offered in rebuttal testimony as to certain testimony on the part of the Petitioner as to the ability of the Maine Company and Mr. Prince to acquire bonds in the New Jersey Company. He will give opinion testimony as to the accumulation of gains and profits on the part of the Maine Company as an expert, and also as to the valuation of the interest in the stock of the New Jersey Company which the Maine Company had in the years in question, and possibly in two or three other matters.

Mr. Welch: I do not seem to find anything missing to which I want to object, except on the point of accumulations. He said it would be testified as to the accumulations in the Maine Company. Presumably you mean by that that he will testify as to accumulations that have been unreasonable.

Mr. Clark: Yes.

Mr. Welch: On that point I have difficulty as to his qualifications, but if Your Honor differs with me I shan't be shocked.

The Member: I have nothing to differ with you.

Mr. Welch: I mean the mere fact that I have difficulty with his qualifications. I merely do not admit his qualifications on the point of testifying as to the reasonableness or unreasonableness.

The Member: Do you object?

Mr. Welch: I object to his testimony on that single point of

Q. 13. (By The Member). Let me ask you one question: You say you have testified in numerous cases before the Board of Tax Appeals and in courts involving tax questions.

A. Primarily valuation matters, Your Honor.

Q. 14. Well, have there been other issues besides valuation issues in which you have testified?

I notice you hesitate. I do not mean to inquire. I do not mean for you to search your memory very closely, but is that the thing that you generally testified about, or can you think of anything else? A. Yes, sir; I can't at this time. I can't think of anything else, except I have testified as to marketability of securities, marketability, and matters that bear on valuation questions.

Q. 15. Yes.

Now, can you say whether there have been any cases where your testimony has been offered, and by reason of objections to it your testimony has been excluded, or you have

not been permitted to testify by the tribunal? A. No, sir; there has never been an occasion where my qualifications have not been accepted for the purpose of the testimony for which I was offered.

The Member: Now I will hear your objection, Mr. Welch, if you have one.

Mr. Welch: Well, I still have not heard anything that would seem to indicate that he could give the reasonableness of a policy of accumulating surplus to meet obligations. If Your Honor feels otherwise, as I stated, I won't be shocked.

The Member: I will hear him.

Mr. Welch: Note an exception.

Q. 16. (By Mr. Clark). During the years 1930 to 1933, were you dealing in bonds and preferred stocks on behalf of clients and for yourself, both on the Exchanges and over-the-counter markets of the country? A. Yes, sir; I was dealing on a very substantial scale.

Q. 17. Referring particularly to the years 1932 and 1933, will you give the Board some idea of the volume of your dealings? A. I did a very large volume of business in railroad and industrial bonds and preferred stocks, and a considerable volume of business in common stocks, both on the Exchanges and over-the-counter. It was not unusual for me at that time to accumulate, for the account of clients for whom I had full power to act, blocks of a million dollars par value or more of individual issues of bonds and also preferred stocks. The total volume of my dealings in those years it would be very difficult for me even to approximate, but it probably ran upwards of twenty million dollars.

Q. 18. Was all this business done on the Stock Exchanges? A. No, sir;—by no means. The bulk of it was in issues that were listed on the New York Stock Exchange, but a considerable amount was done over-the-counter.

Q. 19. Do you mean you bought and sold many listed bonds off the Stock Exchange? A. Yes, sir. It is characteristic of the bond business, and it has been for a period of all the years in which I have been dealing in financial matters, that there is more business in listed bonds done over-the-counter than there is on the New York Stock Exchange, and the same thing applies to other Exchanges as well. It is inherent in the bond business. The Stock Exchange commission is either too high or too low, and bond dealers in number five, six, or seven thousand throughout the United States do not generally belong to the Stock Exchange. The nature of their business is such that the best markets in everything, except a relatively small percentage of a listed security, listed on the Stock Exchange, is found over-the-counter. That is true of high grades and medium grades as well.

If one wanted to buy a block of a hundred thousand dollars of Standard Oil 2¾ or Atchison General 4's at the present time, the Stock Exchange is not the place in which the order would be likely to be executed; it would generally be executed over-the-counter between the two bond houses.

Q. 20. I rather think you answered this question I am about to ask, Mr. Merriman; if so, just tell me.

How would you compare the volume of dealings of the listed bonds over-the-counter and on the Stock Exchange, which is done year in and year out? A. In general, the volume over-the-counter is very substantially larger than it is on the Stock Exchange, with the exception of bonds, which are convertible into common stocks, that are also listed where the prices of the convertible bonds are such—the prices of the stock in which the bonds are convertible is at a level which makes the conversion attractive; in other words, where the bond has taken on the characteristics of the common stock of a somewhat speculative character.

Q. 21. Have you ever bought or sold as many listed bonds over-the-counter as were dealt in on the Exchange? A. I have frequently bought ten or twenty-five or fifty thousand par value of bonds or sold such an amount over-the-counter, with the total volume of dealings on the New York Stock Exchange in that day might be one bond or five bonds, or possibly no bonds at all.

Q. 22. Have you ever been requested to make an investigation as to the market in the securities of the Chicago Stock Yards Company and its subsidiary and affiliated companies? A. Yes, sir; I have.

Q. 23. What years have you covered in your investigations? A. Generally, I covered the years from 1927 to 1933. I checked certain figures as far back as 1923.

Q. 24. What issues did you investigate? A. I investigated the Chicago Junction Railroad, that is the elevated road, 4 percent bonds due 1945; the 5 percent bonds of the Maine Company due 1961; and the 4 percent and the 5 percent bonds of the New Jersey Company due in 1940.

I also checked the market for a short period of time in preferred stock of the New Jersey Company and the 9 percent stamped common stock of the New Jersey Company, and collected a little information as to the prices of Central Manufacturing District, series A and B, bonds which have serial maturities.

Q. 25. Are any of those bonds listed on any Exchange? A. Yes, sir. Two of them are listed on the Boston Stock Exchange, the New Jersey Company 4's and 5's.

Q. 26. Those are bonds due when? A. Due in 1940.

Q. 27. Do you have a summary of the volume of sales and prices of these listed bonds in the years which you have investigated? A. The prices have, I believe, already been introduced in evidence as—I think it is Petitioner's Exhibit 38, but I am not certain of the number.

The volume of trading in the 4's and 5's from 1923 to 1933 I have before me—the figures of them.

Q. 28. From what source did you obtain that information? *A.* That information was obtained from the weekly issues of the Commercial and Financial Chronicle, which report the total sales and the high and low prices of all securities dealt in on the Boston Stock Exchange and a great many other exchanges in each weekly issue.

Q. 29. State whether or not that is a publication recognized by the financial community.

Mr. Welch: I think His Honor knows all about it.

The Member: Do you admit it?

Mr. Welch: I think so.

Q. 30. (By Mr. Clark). Will you give us the volume of sales in high and low prices by years from 1923 to 1933? *A.* I do not have that memorandum as to prices in front of me, Mr. Clark. I believe they are already in evidence.

Mr. Clark: That is correct, is it not?

Mr. Welch: Yes.

The Witness: The volume of sales of 5's in 1933 was $161,000; of 4's, $65,000.

Mr. Welch: That is face value?

The Witness: Yes, sir.

Mr. Welch: What was the amount of the 4's?

The Witness: Sixty-five thousand dollars.

In 1932 it was $191,000, 5's, and $99,000 4's.

In 1931 it was $161,000 5's, and $51,000 4's.

In 1930 it was $168,000 5's, and $113,000 4's.

In 1929 it was $490,000 5's, and $99,000 4's.

In 1928 it was $95,000 5's, and $28,000 4's.

In 1927 it was $138,000 5's, and $33,000 4's.

In 1926 it was $290,000 5's, and $133,000 4's.

In 1925 it was $320,000 5's, and $109,000 4's.

In 1924 it was $374,000 5's, and $119,000 4's.

In 1923 it was $294,000 5's, and $80,000 4's.

The total for the period, if I have added correctly, is $2,672,000 5's, and $929,000 4's.

Q. 31. (By Mr. Clark). Did you obtain prices on Railroad bonds due in 1945? *A.* I obtained bid and asked prices for that issue of securities and have taken off a record of the highest prices at which offerings of those bonds were made.

The Member: What bonds?

The Witness: The Chicago Junction Railroad, the Elevated Railroad.

The Member: Oh, I thought—

The Witness: Four percent bonds.

The Member: I thought it was a general question about Railroad Company bonds. You mean this thing that is called the Railroad Company in this case?

Mr. Clark: Yes, sir. I thought that was identified—

The Member: All right.

Mr. Clark: By the due date 1940. The question might be more specific.

The Member: Well, I didn't realize that.

Go ahead.

A. (Continuing) The markets I obtained, in general, ran from '26 to 1933, though, unfortunately, I did not have available records for the year 1929 in the major source from which such quotations are obtained on over-the-counter securities, these bonds being unlisted. It is necessary to go to the best established source of quotations for over the counter securities, and that is the National Quotation Bureau which publishes daily, monthly, and semi-annual summaries of bids for and offers of unlisted bonds of all types.

Q. 32. (By Mr. Clark). These prices are regarded as a reliable guide to the over-the-counter market in bonds? *A.* Yes, sir; I think they are regarded as the best guide of

the history of price movements of over-the-counter bonds that is available.

Q. 33. What did your investigation disclose with respect to these Railroad Company 4 percent bonds?

Mr. Welch: Object.

The Member: Why?

Mr. Welch: He is talking of bid and asked prices. The bid price and asked price does not equal a sale.

The Member: It may be relevant, nevertheless. I will overrule the objection.

A. The prices I have taken here are not bid prices. They are prices—they are asked prices solely, and I have taken the range of the lowest price at which bonds were offered by brokers, and the highest price at which they were offered by brokers for the years in question. The bid prices on this issue ordinarily would run one to two points below the asked price, but since it is important to know at what price some bonds would be available, I felt that the asked price was a guide as to their availability, a better guide than the bid price.

In the year 1933, the highest asked price for those bonds was 75, and they were offered as low as 67½.

The Member: You are answering—

The Witness: Percent of par.

The Member: You are answering only with regard to the asked price for periods when there was no actual price?

The Witness: When there was no actual sale available in public records.

The Member: That is to say, whenever you were unable to find an actual sale price, you have ascertained the asked price from whatever sources were available?

The Witness: Yes.

Mr. Welch: I didn't—

The Witness: That is, the highest asked price, Mr. Welch.

Mr. Welch: Yes.

The Witness: These are not bid prices.

A. (Continuing) For 1932, the highest asked quotation was 80, and the lowest was 62.

For '31, it was 85 at the highest figure, and 73 as the lowest.

For the year 1930, it was 83, highest, and 78½ lowest.

As I stated, I was unable to get the year 1929.

For the year 1928, the high asked price was 89½, and the low, 82½.

For the year '27, 89½, 84½ low.

And for the six months ended December 30, '27, 85½ high and 83½ low.

Q. 34. (By Mr. Clark). Did you obtain prices on the Maine Company 5 percent bonds? A. Yes, sir. Similarly, and from the same source, I obtained the following asked prices:

In 1933, the highest asked price, 70½; and the lowest, 62¼.

In '32, the highest asked, 79; the low, 64.

In '31, the high asked, 87; the low, 70.

In 1930, the high, 90, and the low, 84¾.

Q. 35. Did you investigate to see whether there was an over-the-counter market for Jersey Company 4 percent and 5 percent bonds? A. Yes, sir; I did.

The Member: Well, I think it is important with regard to each of these particular bonds about which the witness is asked to testify, that when he gives the asked prices, as I understand he has just given, with regard to the Maine Company bonds, that it also be made clear whether or not he has made an investigation and the result of it, if he has, as to the actual sales or sales' prices so that we may know whether the asked price is different from a sales price, or whether there is a sales price.

Q. 36. (By Mr. Clark). You have heard what His Honor has said. Can you make a statement relative thereto, Mr. Merriman? A. I have made no special investigation as to that point, because that necessitates the obtaining from the numerous brokers who were bidding for and offering these particular bonds their private records. One might go through one brokerage house and find that over a period of several years he dealt in a hundred thousand of those bonds; another house might have dealt in only twenty-five of them, and so on, and it would necessitate a great deal of search to obtain the information, and then it would be questionable whether it would be evidential in character.

I know from experience that bonds that are actively quoted in the National Quotations Bureau, and the Standard Statistics sheets of bond offerings and bids have reasonable markets, where the bid, let us say, is 80, and the asked price is 82, that the sale tends to take place a little under the asked price and a little over the bid price. That is not invariably the case, but in general it is true that, if a broker is offering bonds at 82, a medium grade bond where 80 is bid, that you can buy those bonds at about 80½—81½, and if you were to attempt to sell him bonds, he would probably pay you 80¼ or 80½.

Q. 37. Now, I will renew the question which I asked you: Did you investigate to see whether there was an over-the-counter market for Jersey Company's 4 percent and 5 per cent bonds? A. Yes, sir; I did.

Q. 38. And what did you discover? A. I found Jersey 4's quoted as follows, from 1933 going backwards: the high asked price, 93; the low asked price, 85.

And in 1932, the high asked, 90; the low asked, 68.

In '31, the high asked, 96; the low asked, 81⅜.

In 1930, the high asked, 95; and the low asked, 90.

And for the year 1928, the high asked, 92½, the low, 92.

In 1927, the high asked, 93; the low, 90.

And in 1926, the last half of 1926, I should say, the asked 91, and the low 90. Jersey 5's—

Q. 39. Well, let me ask you at this point, were those the Jersey 4's? *A.* Those were the Jersey 4's.

The Jersey 5's in '33, I found the asked prices to have a range of 101 high, 93¼ low.

In 1932, 98¼ to 83.

In '31, 104¼ and 90.

In 1930, 103, and 100.

In 1928, 103 and 98.

In 1927, 102 and 100¼.

In the last half of 1927, 101½ and 97¾.

The Member: Now, as to those bonds of the New Jersey Company, will you say whether or not there were in all or any of those years that you have named actual sales?

The Witness: I have no personal knowledge of actual sales.

The Member: Would you say that you had no personal knowledge of whether there were actual sales or not?

The Witness: Over the counter?

The Member: Any way.

The Witness: I have no knowledge of actual sales of any of those bonds; that is, personal knowledge.

Q. 40. (By Mr. Clark). Now, is that for the same reason that you gave relative to some of these other bonds about which you have testified?

Mr. Welch: I object to that. The fact that he has no personal knowledge is the final thing. The reason he has is of no importance.

Mr. Clark: I think it is of importance.

The Member: Please read the question.

(Question read.)

Mr. Clark: Well, strike it.

Q. 41. (By Mr. Clark). Have you made any investigation relative to that?

Mr. Welch: To what, sir?

Mr. Clark: Relative to actual sales.

A. No, sir; I have not contacted brokers and dealers scattered through the United States, whose names appear in the National Quotations Bureau of records as having been active in the market in these bonds during that period of time. I know that it cost the brokers money—

Mr. Welch: Just—

A. (Continuing)—to list these offerings and bids with the National Quotations Bureau, and I am certain that the frequency with which those quotations appear, that a reasonable volume of business took place.

Mr. Welch: I move to strike the answer after the words "No, sir."

The Member: Yes, I think so. It is because of your questions, Mr. Clark, that that comes about. The witness should answer specifically, and when he goes on beyond it, you never know how far he is going, and he is not to be the judge of that. You asked him whether he made any investigation, and that does not call for gratuitous discourse on what difficulties brokers have in filing their—

Mr. Clark: I was going to follow it with another question.

The Member: Suppose you do. I will strike the last part of the question.

Q. 42. (By Mr. Clark). Why did you fail to make such an investigation?

Mr. Welch: Objection. His reason for failing to make it is of no importance. He just didn't make it.

Mr. Clark: He has explained in the prior instance what the situation is, and the difficulty of going from brokerage house to brokerage house in order to get the private records, the actual number of sales. Now, the same situation, I as-

sume, applied here. I would like to have him testify as to whether or not that is true.

The Member: I will let him testify to that.

1. I did not make an investigation with brokers since over a period of time there were probably 100 brokerage houses that appeared as bidding for or offering these bonds, located, some of them, in Boston, some of them in Chicago, some of them in New York, and some of them in other parts of the United States. And I went no farther than to convince myself that there was a reasonable over-the-counter market for those securities.

Q. 43. (By Mr. Clark). What source did you go to for these records which you have given in this instance? A. I went to the National Quotations Bureau for my annual bond summaries. I checked those, the prices which appeared therein against another publication that is less used, but is used to a great extent; that is, the Standard Bond Offerings published by the Standard Statistics Company, and I further checked certain of them in the Commercial and Financial Chronicle, which gives over-the-counter bid and asked prices for these securities for certain years.

The Member: I don't understand this at all. Did I understand you to say that it is a simple thing to get bid and asked prices, but it is an extremely difficult thing to get actual sales prices?

The Witness: Yes, sir; it is just like real estate. The sale price—

The Member: Why is it more difficult for brokers to send in the actual sales prices than it is to send in the bid and asked prices?

The Witness: The brokers could send in their sales prices but the brokers' sale prices always—virtually always is a double price. He buys at one price from a dealer and sells at another price to a client. The broker is not in the

business of accumulating these bonds; he is in the business of dealing in them, and he buys a bond at 81 and sells that bond at 81½ or 82, and he does not wish to publish to the world the price at which he sold it. That is his personal business. Nor does he wish to publish to his client that he has made a profit of half a point or maybe 2½ points on such a transaction.

The Member: But I understand he is perfectly willing to and it is entirely convenient for him to send in the demand price given to him by someone who sells he is willing to sell at such and such a price?

The Witness: Yes, sir.

The Member: And the other price that is offered by some one who is willing to buy?

The Witness: Yes, sir.

May I show you why he does that? The reason for these listings is that there is no central meeting place for the brokers and dealers who do business over-the-counter in which they make their offerings in the fashion that they are made on the floor of the New York Stock Exchange. Therefore, if a broker has an order to sell certain bonds of the XYZ company, in order to have that order known not to one or five or ten but to hundreds of people who are in the bond business as dealers, he lists his offerings during the day with the National Quotations Bureau or his bids, as the case may be. The National Quotations Bureau publishes those in the form of a series of mimeographed sheets which are sent to all subscribers, which number several thousand among the leading investment houses, over-the-counter houses, banks and insurance companies, and financial institutions who are watching the markets in these bonds and stocks through the sheets of the National Quotations Bureau in the same fashion that owners of listed securities tend to watch their securities in the paper.

If the broker having these ten XYZ bonds for sale doesn't know who it goes to, he picks up the daily sheet of the National Quotations Bureau, and he may find that on that particular day somebody wants to buy ten or twenty of those bonds, so he immediately contacts him on the telephone, and instead of the necessity of calling up a thousand brokers, he finds the best market as a rule by calling two or three or a dozen.

The Member: Then that publication is a wholly different publication and with a wholly different function from the Commercial and Financial Chronicle which merely is a publication after the event of what has happened?

The Witness: Yes. Yes, sir. This is a service publication to investment dealers and over-the-counter houses, banks, and financial institutions that have dealings in over-the-counter securities.

The Member: Go ahead, Mr. Clark. I never heard of this National Quotations publication before, so that I was entirely ignorant of it.

Q. 44. (By Mr. Clark). Now, will you state, Mr. Merriman, whether or not in your opinion it would have been possible to have bought a considerable portion of the outstanding $14,000,000 Jersey bonds between 1916 and 1933 at a considerable discount below par by consistently bidding for them on a competitive basis? A. Yes, sir. I am certain that a very large proportion of that issue could have been acquired in the open market during those years merely by maintaining bids approximately equal to the best bids shown in the market.

Q. 45. Does the same thing hold true with respect to the 6 percent preferred stock of the Jersey Company? A. Yes, sir; it does.

Q. 46. Have you made an examination of Petitioner's Ex-

hibit No. 2, the lease of the Railway Company by the Chicago River and Indiana Company? A. Yes, sir.

Q. 47. And have you examined the Petitioner's exhibits which are the Interstate Commerce Commission's decisions as to this lease? A. Yes, sir.

Q. 48. Have you made any other investigation as to the Chicago River and Indiana Railroad and its earnings? A. Yes; sir; I have examined the final valuation report on the New York Central Railroad issued by the Interstate Commerce Commission, which final valuation report includes the valuation of the property of the Chicago River and Indiana as well as the property of the Chicago Junction Railway Company, the company that is called the Railway Company in this case. I have further examined the earnings of the Chicago River and Indiana Company—

The Member: What is that I. C. C. reference officially?

The Witness: The valuation report in Interstate Commerce Commission valuation Docket No. 1022, New York Central Railroad Company, et al., continued. It is the second volume of the valuation report of the entire New York Central system, being of two volumes, and this, I believe, is volume 29—or 28. Excuse me.

The Member: Isn't there an I. C. C. report reference, or doesn't it appear in the I. C. C. report?

The Witness: I am not certain whether this number, Your Honor, D-751 is a reference number or not.

(The volume referred to was handed to the Member by the witness.)

The Member: No. 28 Valuation Reports 1.

The Witness: I have also investigated the earnings of that company for a short period of time prior to its lease of the Chicago Junction Railway Company properties, and the earnings of the company subsequent to that time—that is, from 1922 to 1933.

Q. 49. (By Mr. Clark). Where did you obtain this data? A. I obtained it from Moody's and Poor's Railroad Manuals, from the issues from 1922 to 1934, inclusive.

Those figures, I should say, are issued to the Interstate Commerce Commission, and the Moody's and Poor's statements are simply a restatement of the same figures in a somewhat condensed form.

I have checked certain of these figures in Moody and Poor against the Interstate Commerce Commission's statistics of railways in the United States, which is their annual publication, giving complete statistics on all Class I, II, and III railways, and on all switching and terminal railways in the United States.

Q. 50. State whether or not Poor's and Moody's Manuals are well recognized sources of statistics with respect to railroad securities. A. Yes, sir; they are.

Q. 51. Have you had particular occasion to study the New York Central Railroad and its subsidiaries in recent years? A. I believe I mentioned an occasion in my qualifications a considerable time when I have been engaged by the New York Central in connection with a valuation of its properties in the State of New Jersey, which has necessitated a valuation of the entire system, and an examination of both the earnings and financial position of the parent company, as well as that of a number of its subsidiaries.

Q. 52. Have you prepared a table giving the annual earnings of the Chicago River and Indiana Railway? A. Yes, sir; I have.

Q. 53. What period does it cover? A. The years 1921 to 1933, inclusive.

Q. 54. And from what source was that prepared? A. That was prepared from the sources which I have mentioned, Moody's and Poor's Manuals.

Q. 55. You have a copy of that table? A. Yes, sir.

(The witness hands papers to Counsel.)

Mr. Welch: Are you offering it?

Mr. Clark: I am about to.

I offer this in evidence, Your Honor.

Mr. Welch: I object to it on the ground that the testimony shows that it is prepared from hearsay. It may be very dignified hearsay, but it is nevertheless hearsay.

The Member: That is as to Poor's and Moody's Manuals?

Mr. Welch: Poor's and Moody's, with some checking, as I understand it, from the Interstate Commerce Commission's reports.

The Member: Is there not on the face of the proposed exhibit a statement of the precise sources from which the figures have been derived, Mr. Clark?

Mr. Clark: Yes, sir.

The Member: Suppose you hand it up and let me look at it.

(A paper was handed to the Member.)

The Member: Is it correct, Mr. Merriman, to say that every figure on this exhibit can be checked by reference to Moody's Railroad Manuals of 1922 to 1934?

The Witness: Yes, sir; so far as I know. I personally checked a substantial portion of them. Some of them—the table was prepared by my staff.

The Member: Is it correct to say that with regard to the column of each year that it can be checked with the Moody Railroad Manual of that year?

The Witness: No, sir; the Moody Railroad Manual of the subsequent year.

The Member: Now, is that universally true with regard to this exhibit, so that if you were to check the figures in the 1923 column you could do so by going to the Moody Railroad Manual of 1924?

The Witness: In general, it is true, Your Honor, and it

is possible that, since Moody generally publishes two or three and sometimes five years' earnings, statements, and balance sheets, that some of the figures for 1923 might have been taken, let us say, from the 1925 number. The figures, however, have been carefully checked in my office against Moody's Manuals for that period.

The Member: In my opinion, it is only necessary, in order to see to it that this exhibit is fairly in evidence, that the Petitioner be given an opportunity to check it with its sources and a very clear statement of the way that that checking can be done; that is to say, it should not be left to generalization, such as that in some instances this particular type of check would not yield any result but another type has to be adopted. It is not fair to require the adversary to search too far to find the places where the checking can be satisfactorily done. So that if the proffer of this exhibit is accompanied with the sources made available to the Petitioner's Counsel together with reasonable assistance as to how the sources and where the sources can be found, there will be no objection. That is a matter of expedition, expediency. Otherwise I will have to reject the exhibit, because it is based upon something else which is not in evidence.

Mr. Clark: Of course it is offered subject to check, Your Honor.

Q. 56. (By Mr. Clark). Mr. Merriman, could you within some reasonable time supply the Petitioner with the precise sources, that is, the issues of the Moody Manual from which these particular figures can be checked? *A.* I could probably within a reasonable time—that is, by tomorrow morning—do so. I might have to contact my office, because a full file might not be available here.

In general, I will say that you will find in the later years of the period five years' earnings reported in each Moody

Manual; that is, 1934 manual you will find five years ending in 1935. In some of the early periods I know that there are one or two or three years available in one manual.

The Member: I suggest the offer be withheld until the Counsel have ascertained whether or not they cannot agree upon the sources and be assured that the sources are satisfactory. If that be done, the objection would be obviated. Until that is done—

Mr. Clark: Well, can't we put it in subject to check, Your Honor?

The Member: I do not think there is anything to be achieved by that, because it will necessitate a motion to strike in the event it is not available. The witness says he can do it by tomorrow morning, so that by tomorrow morning I think a satisfactory adjustment of this can be reached.

Mr. Welch: I might say that I have every confidence in the accuracy, but I want to do the work at this end of the table, and I think some checking should be done.

Mr. Clark: Very well, Your Honor. The offer will be withheld.

The Member: It might be better if it is marked for identification.

Mr. Clark: Yes.

The Member: What is that, four times N?

The Clerk: Yes.

Q. 57. (By Mr. Clark). Now, have you prepared balance sheets for the road from the year 1921 to 1933? A. Yes, sir; from the same sources.

Q. 58. And do you have a copy of that table? A. Yes, sir.

(The witness hands a paper to Counsel.)

Mr. Clark: This I intend to offer, Your Honor, but, of course, it is in the same situation as the previous one.

I ask that it be marked for identification at this time.

The Member: That will be marked for identification as OOOO.

Q. 59. (By Mr. Clark.) Have you investigated the financing of the New Jersey Company in 1915; that is, the original issue, the $10,000,000 5 percent bonds? A. Yes, sir; I have done so.

Q. 60. And have you secured data as a result thereof? A. Yes, sir. I checked the report of the issuance of that sale of $10,000,000 of 5 percent bonds of that company in the Commercial and Financial Chronicle of April 10, 1915, volume 100, page 1261.

Q. 61. Now, at what prices were those bonds sold? A. They were sold at 99 and interest, yielding approximately 5.05 percent to the investor.

Q. 62. And what did the prospectus show as to the amount available to yield interest charges?

Mr. Welch: I object. That is so far back.

The Member: Well, its antiquity has nothing against it, if that is all you have to say about it.

Mr. Welch: If we are going into the prospectus—I do not know whether we are not, but that is what it seems to be leading to.

The Member: He is asking what did the prospectus show.

Mr. Welch: Go ahead. I don't care.

The Witness: The combined earnings of the Union Stock Yards & Transit Company and Chicago Junction Railway Company, securities of which were deposited as collateral for this issue of 5 percent bonds, were shown to have been, in 1914, $2,104,000; in 1913, $2,168,000.

I am reading these in round figures.

The year 1912 is not given.

1911, $2,102,000.

The Member: We will take a short recess.

(There was a short recess taken.)

The Member: All right. Proceed.

Q. 63. (By Mr. Clark). When did you first begin a study of this Chicago Stock Yards Company? *A.* Late in November of 1938.

Q. 64. Did you do that at my request? *A.* Yes, sir.

Q. 65. You were furnished with the preliminary copy of the stipulation and the exhibits at that time? *A.* Yes, sir.

Q. 66. And were you later furnished the revised stipulation and additional exhibits which have been filed here with the Board? *A.* Yes, sir.

Q. 67. Have you had any assistance in this investigation? *A.* I have had from two to four of my staff working on various phases of it almost continuously since I was retained in the matter.

Q. 68. Now, have you made a study of the earnings of the Maine Company and of its balance sheets and those of its subsidiaries, and of those of the New Jersey Company and its subsidiaries for 1933, and prior thereto? *A.* Yes, sir; I have.

Q. 69. Have you examined the dividend record of the Maine Company from its formation to 1933? *A.* Yes, sir.

Q. 70. Have you studied the policy of other corporations in the United States to ascertain the relation of their dividend payments to their earnings for a period of years prior to 1933? *A.* Yes, sir.

Q. 71. Will you outline the nature of this study? *A.* I took the statistics of income published by the Bureau of Internal Revenue of the United States Treasury Department and examined the reports which showed corporations earning profits for the years 1923 to '33. I might say that '23 was the first year in which the figures of earnings and dividends of corporations reporting profits were published by the Bureau of Internal Revenue. And I calculated the percentages of dividends in relation to income for corpora-

tions in various categories that are shown in those annual reports, taking all manufacturing corporations as one group, taking food companies as another group, taking trarsportation and public utilities as a third group, and taking banks, insurance, finance, and holding companies as a fourth group.

The Member: Let me hear the question.

(The question was read.)

Mr. Clark: I really don't think the answer of the witness, Your Honor, was quite responsive to the question that I asked.

The Member: Well, that is what I thought. The question as to "have you studied the policy of other companies," I don't know what the Bureau of Internal Revenue statistics would have to do with that. Still, it may have a lot to do with it.

Mr. Clark: Well, I am not sure, perhaps if I could have the answer read as it was given to the question "Will you outline the nature of your study," I might be able to make up my mind as to whether to have it stricken or not.

The Member: Well, read from the first question that you read, that I asked you to read, from thereon.

Is that what you mean?

Mr. Clark: Well, he answered that he has studied it.

The Member: And go on from there.

Mr. Clark: Yes.

(The record was read as follows:

"*Q.* Have you studied the policy of other corporations in the United States to ascertain the relation of their dividend payments to their earnings for a period of years prior to 1933? *A.* Yes, sir.

"*Q.* Will you outline the nature of this study? *A.* I took the statistics of income published by the Bureau of Internal Revenue of the United States Treasury Department and examined the reports which showed corporations earn-

ing profits for the years 1923 to '33. I might say that '23 was the first year in which the figures of earnings and dividends of corporations reporting profits were published by the Bureau of Internal Revenue. And I calculated the percentages of dividends in relation to income for corporations in various categories that are shown in those annual reports, taking all manufacturing corporations as one group, taking food companies as another group, taking transportation and public utilities as a third group, and taking banks, insurance, finance, and holding companies as a fourth group.")

Q. 72. (By Mr. Clark). Now, did you make reference to Standard Statistics Company? A. I had not completed the statement with respect to the study that I have made. I further studied the composite of financial statements of leading American railroad and industrial corporations, which has been published for a number of years past by the Standard Statistics Company, which shows the figures of earnings and dividends as well as other data, and I made a separate study of all of the stock yards companies in the United States which published reports as to their financial condition and published earnings, their earnings and their dividends that could be located in Moody's and Poor's Manuals.

There were seven of those stock yards companies which that data was available for from 1925 to 1933, and there were a smaller number which I carried back as far as 1921.

Q. 73. Now, I am not sure whether you have included in answer to this question, in the answer that you have given with respect to your first study, what the statistics covered. A. That was a study from the statistics of income published by the U. S. Treasury Department, covering the years 1923 to '33, and shows a table which I have prepared from that, shows the net earnings and cash dividends paid and

the percent paid in dividends by all manufacturing companies earning profits, by food companies, transportation and public utility companies, and banks, finance, insurance, and holding companies.

Q. 74. What did you understand as to the source of these Treasury Department figures? *A.* I understand they are compiled by the Treasury Department from the income tax returns.

Q. 75. Now, have you a typewritten summary of the data for the corporations you have referred to? *A.* Yes, sir; I have.

Mr. Welch: Are you offering it?

Mr. Clark: Yes. Excuse me. I didn't know you had finished your investigation.

Yes, I offer this in evidence, Your Honor.

Mr. Welch: I think Your Honor might glance at it while I state what I have to say.

(The paperwriting referred to was handed to the Member.)

The Member: I have it before me.

Mr. Welch: I object to this offer on this ground: It seems to me impossible to encompass in this trial any adequate inquiry into the capital set-up and averages of these various companies, how their stock was held, whether by individuals or widely separated, what their maturities were, what their reasons were for saving money, so that these huge averages of companies and in a widely separated field seems to me to have so little probative value in this case, that I think the exhibit as a whole becomes immaterial and should not be received.

The Member: I agree. I will sustain the objection.

Let the exhibit be marked, so that any question as to

its exclusion will be identified with the paper. It is four times "P," isn't it?

The Clerk: Yes.

Mr. Green: That is marked just for identification?

The Member: It is marked for identification, and the record shows that it is excluded from the evidence.

Mr. Clark: I will make a proffer, Your Honor, in just a moment.

The Member: Isn't that a proffer? That is why I had it marked for identification. It has been described and the paper itself is now clearly identified, and that is excluded.

Mr. Clark: But I ought to make a proffer of the purpose for which it is offered, shouldn't I, in case of appeal?

The Member: Oh, I don't know.

Mr. Clark: Yes, I think so.

The Member: I leave that to you.

Mr. Clark: I offer this as showing the basis on which the witness relied in arriving at his opinion, which he has stated, or arriving at the opinions he stated.

The Member: What opinion? The opinion as to what?

Mr. Clark: No, I am wrong about opinion.

Well, he has made a study of the earnings of the Chicago Stock Yards Company, and now, in the course of his study of the policy of other corporations in the United States, he has resorted to this as one of his sources of information, and for that purpose it is offered.

The Member: Yes. Well, now, the rationale of my exclusion is that, as I understand it, the only probative force that this exhibit, or proffered exhibit could have, would be upon the question of the reasonableness of the accumulation of the taxpayer here in respect of subdivision (b) of section 104 of the statute, and it seems to me that it is going beyond the realm of any possible decision that the Board may be required to make, to have that reasonableness as

to this particular taxpayer tested by the similarity of the ratio of its dividends to its earnings with the composite ratio of the dividends to the earnings of all of the other corporations in the United States who file income tax returns, and who are to be assumed, without evidence, to be included within the report of the Treasury Department as to the statistics of such corporations classified as the Treasury Department may have classified them in this report, without an identification of the particular corporations; and if the identification of the particular corporations were proffered, I should say that that would have to be excluded because it goes far beyond the realm which this case can take.

I perhaps should add that there are other reasons that occur to me, which it seems to me are unnecessary to be stated in the light of the all-inclusive and all-embracing statement that I have made. If it becomes necessary, I think that there would be a number of others that I should have to state.

Q. 76. (By Mr. Clark). You have stated that you have made a study of the dividends and income based on certain data published by Standard Statistics Company? A. Yes, sir; I have done so.

Q. 77. You have described what the Standard Statistics Company is? A. I do not believe so, but it is—

Q. 78. Excuse me, then. Will you please do so? A. It is the largest financial statistical organization in the United States, and probably in the world. They have been in business for a period of perhaps 30 years, and furnish a very large mass of statistics to investment organizations of all types with respect to corporations and economic organizations in the United States.

Q. 79. What did your study of that disclose?

Mr. Welch: I object to that. It is such a broad question, I just don't know how to deal with it.

The Member: Well, doesn't this relate to the same field that we have just been discussing in connection with the proffered exhibit?

Mr. Clark: Yes, Your Honor, I expect so.

The Member: I will sustain the objection.

I don't know where the line is to be drawn between the data which I may properly consider and the data which I may not, but I think I will have to exclude this on the ground that it goes infinitely further than any line which might reasonably be drawn. I suppose we could go on from now on to doom's day and consider the practices and results of the practices of all the corporations in the world, and then test it by that, but I can't believe that that is our job.

Q. 80. (By Mr. Clark). Have you made a study as to the Stock Yards Companies in the United States? *A.* Yes, sir; all stock yards companies of which I could—about which I could obtain data as to their earnings and balance sheets.

Q. 81. Where did you obtain these statistics? *A.* From Moody's and Poor's Manuals, volumes between 1922 and 1934.

Q. 82. Have you put this data in the form of a table? *A.* Yes, sir; I have.

(A paperwriting was handed to Mr. Clark by the Witness.)

Mr. Clark: I will offer this in evidence, Your Honor.

Mr. Welch: Objection on substantially the same grounds as the Exhibit PPPP, which was excluded.

Mr. Clark: This stands on a very different basis, Your Honor.

The Member: Well, I will have to have you elucidate that.

Mr. Clark: Well, here are definite stock yards which are set forth, and these are statistics from Moody's and

Poor's Manuals. This isn't an indiscriminate lumping, as you might say, of a whole lot of unidentified corporations. These are perfectly identifiable.

The Member: There is so much reasoning that has to be done, and I find it difficult to say what it strikes me is the necessary ruling about this exhibit, but I will have to take a chance on what the courts will have to say about this, because the subject has never been adjudicated, and there has never been any expression on it. But it strikes me that the statute cannot be construed so as to suggest that in determining whether there has been an accumulation of earnings and profits beyond the reasonable needs of the business of any corporation—perhaps that is too broad; perhaps I needn't go that far and better not—but as to the reasonable needs of the business of a corporation such as the taxpayer here, whom you might call a non-operating company in order to avoid the use of these terms "holding" or "investment" companies, that the reasonableness of the accumulation of its earnings and profits is to be tested by a comparison of the ratio for the last 15 years of the dividends of other corporations engaged in one way or another in a similar business, the similarity of which is only disclosed by their titles which include the words "stock yards"; that is, the ratio of their dividends actually declared and paid as shown by the publication to their earnings and profits as shown by that publication.

Now, I guess I have to take the chance on being wrong, but it seems to me inconceivable that this statute can be applied by that means, and although I realize that the exclusion of the evidence of this kind in this case necessarily must be based upon a ground so broad that if it is sustained it will exclude similar evidence in thousands of other cases, nevertheless it seems to me clear that the test can-

not be by this means, and I shall have to exclude the evidence and sustain the objection.

Let the exhibit be marked for identification as QQQQ.

Mr. Clark: I offer the original, Your Honor.

The Member: Let me ask you, Mr. Clark, whether there is any support in books or opinions of the Board or in the opinions of any of the courts for applying the statute by this type of test, or whether this is a new venture on your part?

Mr. Clark: Yes, Your Honor. I think the National Grocery Company case, the language of the Supreme Court, which I do not have before me, but to which—or, in which, rather, reference was made to the test.

The Member: Well, yes. You mean this language that I read the other day in the course of the discussion—

Mr. Clark: Yes.

The Member: —in which the question of reasonableness was likened by Judge Hand to the question of reasonable care in tort cases?

Mr. Clark: Yes, sir.

The Member: Well, I have that in mind, but I would like to know whether there are other instances where this type of evidence, statistical evidence and comparisons, has been used as the standard by which that question of reasonableness is to be influenced.

Mr. Clark: No; I do not know of any.

The Member: All right.

Mr. Clark: I am afraid that I did not ask an exception.

The Member: Well, you have an exception as to all of these exclusions.

Mr. Clark: Yes. Thank you.

And I make the proffer for the same purpose and in the same way as in the other case.

The Member: Yes.

Q. 83. (By Mr. Clark). You have an extra copy of this last, Mr. Merriman? *A.* Yes, sir.

(The witness hands a paper to Counsel.)

Q. 84. Now, Mr. Merriman, you have already stated that you have examined the stipulation of facts and the exhibits attached and the exhibits that have been introduced in evidence at this hearing by both the Petitioner and the Respondent. *A.* Yes, sir.

Q. 85. Have you heard the evidence of witnesses, or read the record in the case of their testimony? *A.* Yes, sir.

Q. 86. Of all of them? *A.* I have either read the full record or I have attended the hearings personally on such days as I have not read the record.

Q. 87. Now, in the light of all this, and your special training and business experience, have you an opinion as to whether in the years 1930, 1932, and 1933, the Maine Company was a holding or an investment company?

Mr. Welch: Objection.

The Member: The objection is sustained. That is a question of law and the statute on which the witness may not competently testify.

Q. 88. (By Mr. Clark). Have you formed an opinion as to whether in these same years the Maine Company accumulated gains and profits beyond reasonable needs of the business? *A.* Yes, sir.

Q. 89. And what is that opinion? *A.* My opinion is that it did so.

Q. 90. Will you state your reasons for that answer? *A.* Yes, sir.

My study of this corporation was, first, for the purpose of determining the income of the Maine Company historically; second, for the purpose of determining the source of that income; and, thirdly, the reliability of that source.

Therefore, I first studied the Railway Company, since

that was the largest single contributor to the income of the Maine Company indirectly, and I studied the Transit Company and its subsidiary, the Produce Terminal Company, which is a direct subsidiary of the Maine Company, Central Manufacturing District; and I checked to some extent the portfolio of the companies' own assets to see what earning power might be indicated thereon.

Now, the lease of the Railway Company provided an income of $2,000,000 a year, from which certain taxes had to be paid. Of that income, some $626,000 went to the Transit Company and the balance was the income of the Railway Company; but I did not think it important to split those two items, since the source was the Railway Company.

The--

The Member: Let me interrupt. I am thinking too much about something else, and I want to get it off my mind.

Will the Reporter read, please, the question that was asked preceding this one, where the witness was of the opinion that it was a holding company?

(The record was read.)

The Member: I will change my ruling as to that. I will overrule the objection and permit the question to be answered, the question being as to whether you have an opinion as to whether it is a holding or an investment company.

Mr. Clark: Very well, Your Honor.

Now, perhaps the testimony which the witness has given so far on the question following that had better be completed now, and then we will go back to the question of the holding company.

The Witness: It is immaterial to me, Your Honor.

Mr. Clark: Well, Your Honor--

The Member: Well, did you intend to pursue it any further than to ask him categorically what his opinion is?

Mr. Clark: And state his reasons.

The Member: Oh. Well, all right, let the record show, then, that I am overruling the objection to the question as to whether he has an opinion, permitting that question to be answered, and then I will let you go on in any way you choose about that. If you want to take up the earlier inquiry, I do not care. I do not want to have this witness go on talking while I am thinking about something else.

Q. 91. (By Mr. Clark). Well, now, Mr. Merriman, which would you prefer? Can you pick up your trend of thought on this question which you were answering when His Honor interrupted, if you stop at this time and go back to your opinion as to the holding company? *A.* I think it would be simpler to go back to the holding company.

Q. 92. Very well.

The Member: Now, answer the question as to whether you have such an opinion as to the holding company.

The Witness: I have.

Q. 93. (By Mr. Clark). And what is that opinion? *A.* This company is a holding or an investment company.

Mr. Welch: Just a minute. I think for the sake of the record I should note an objection here.

The Member: I overrule the objection.

I am overruling the objection only because I think there is still some uncertainty as to whether the statutory terms "holding and investment company" are terms upon which evidence is properly admissible, or whether they are terms of law on which the decision of the Board must be made, irrespective of the testimony, or whether they are common or garden terms on which the law is uncertain. That being the state of my own understanding of the law as it is at present, I am not willing to let the record exclude that evidence.

You may answer the question.

Mr. Clark: What was the question, Mr. Reporter?

(Last question read as follows:

"*Q.* And what is that opinion?")

A. My opinion is that it was a holding or an investment company.

Q. 94. (By Mr. Clark). And will you state your reasons for arriving at that opinion? *A.* My reasons for that opinion are, first, that the company was originally set up for the acquirement of a controlling interest in another holding company, so that in its inception it was a holding company of a holding company.

The Member: Mr. Welch, does the Petitioner dispute that the Maine Company was a holding company?

Mr. Welch: No. The only word I am allergic to is the word "mere."

The Member: The answer is that the Petitioner does not dispute that the Maine Company is a holding company; is that correct?

Mr. Welch: I am prepared to state that the Maine Company is a holding company.

The Member: Well, we can get the witness' exposition on the theory of that.

Mr. Welch: I think I ought to add that I claim that the Maine Company is something in addition to a holding company, but, among others, it is a holding company.

The Member: The question that has been put, the question that the witness is answering, is whether in his opinion it is a holding or an investment company. Now, as to the holding company, you admit it is a holding company so that he does not have to elaborate on that.

Q. 95. (By Mr. Clark). In your opinion, did it exercise any other functions than that of a holding company?

Mr. Welch: I object to that. That seems to be clearly a factual matter.

The Member: Well, that embodies several things. It

embodies his conception of a holding company, and as to that it is a question of facts.

Mr. Clark: Then, Your Honor, he should be permitted to continue with his statement as to his opinion that it was a holding company. He was interrupted, and I do not think that he had finished.

Had you, Mr. Merriman?

The Witness: I thought I had finished.

Mr. Clark: You had.

The Member: Then, you are all through.

We are all on very thin ice here. The words here have all come together in a way that makes it difficult for anybody to know what is included and what is excluded. The statute says that a corporation is a mere holding or investment company.

Mr. Clark: Then, don't you think that that is a question for expert testimony?

The Member: I would respectfully decline to express an opinion on that. I had something to say about that language in the statute in the Rand case. I thought I was shortening it by getting the Petitioner to admit the substance of the answer to your question. If I was not, I do not suppose I accomplished very much.

Mr. Clark: Did I have a pending question? There was an objection. Has that objection been ruled on?

The Member: We will see what the state of the record is.

(The record was read.)

The Member: Well, I will sustain the objection only because I do not know whether the witness is being asked for facts from which it can be determined that it was a holding company, or whether he is being asked about an opinion about something which embodies several facts not stated.

Mr. Clark: It is his opinion based entirely on the stipulation and the record evidence in this case.

The Member: I know, but your question is, Is it in your opinion doing something? Now, if the corporation is doing something, it is a matter of fact as to what it is doing, and from that you can proceed.

Mr. Clark: Well, I will rephrase the question.

Q. 96. (By Mr. Clark). In your opinion, based on your examination of the entire record including the stipulation of facts and the exhibits, do the facts which therefrom appear as to the activities of the company make it, in your opinion, anything more than a holding company?

Mr. Welch: Objection.

The Member: I will overrule that objection.

Mr. Welch: May I say, I do not know whether there is any point about it, but here we have all the facts, and this witness is asked as an expert to draw what seems to me a legal conclusion from those facts.

Is this a holding company? That conclusion, it seems to me, is within Your Honor's province and not in the province of the witness.

The Member: Well, the Board cannot permit that province to be taken from it by any testimony that this or any other witness may give. That does not mean that the witness may not express an opinion, if it is helpful in leading the Board to its conclusion.

The Petitioner's witness Blough used the term "holding company," and at my instance he said that that term was used in the vernacular, so that that took it out, I thought, of the question of the meaning of the word in the statute.

I think that anything any witness may say on that subject is less than enough to take the question away from the Board for decision, and the Board may have the power, and indeed may have the duty, to make the decision, irre-

spective of what thousands of witnesses on the subject may think or testify.

Mr. Welch: May I have my exception noted?

The Member: Yes.

The Witness: May I have the question?

(Last question read as follows:

"*Q.* In your opinion, based on your examination of the entire record including the stipulation of facts and the exhibits, do the facts which therefrom appear as to the activities of the company make it, in your opinion, anything more than a holding company?") *A.* No, sir.

Q. 97. (By Mr. Clark). Will you state your reasons for that statement?

Mr. Welch: I think I will note an objection, because I object to the whole line.

The Member: The objection is overruled, with an exception.

A. The Maine Company for years past, according to the tax records in the case, had had a purely nominal organization. It had a president, who drew a large salary; it had a treasurer, who in the years involved in this case drew a salary of $500 a year; it had an operating staff, which drew total salaries of $2,000 a year; its office rent was an average of three or four hundred dollars a year, which, in my opinion, is clear evidence that it undertook no supervision over the affairs of the companies in which it had substantial interests other than that, which was provided by the president of the holding company, who was, in turn, either president or chairman of the board of the sub-holding company, and who was also president or chairman of the board of the Railway Company and of the Transit Company and trustee of the Central Manufacturing District. It is inconceivable to me that Mr. Prince, as president of the Maine Company, would give himself orders as president of the

Jersey Company to transmit orders to the Union Stock Yards & Transit Company of which he was chairman of the board. It is inconceivable to me that any function of supplying advisory management by the Maine Company could have been conducted under an office expenditure such as is shown in the income tax returns in this case. The policy of the company has revealed in its—

The Member: You mean the tax returns for the years 1930 to 1933?

The Witness: '33; yes, sir.

The Member: There were a great many tax returns entered in the case for years other than those.

The Witness: Yes, sir. I have examined no data in this case beyond the year 1933.

The Member: How about prior to 1930, the years prior to 1930.

The Witness: The years prior to 1930, the same situation prevailed so far as my examination of those records went back for some years. I was reviewing this company in the critical years of the period and not reviewing its activities in 1915, or thereabouts, because I understood that this question would be asked with respect to these years and not with respect to its origin.

1. (Continuing) The record of income of the Maine Company shows that continuously for a considerable number of years, it accumulated surplus—

Mr. Welch: Could we interrupt a moment? I wonder if that hammering could be stopped. I find it very difficult to hear.

The Member: I am hoping it will.

We will suspend now to a quarter after two.

(Whereupon, at 12:35 o'clock p. m., a recess was taken until 2 o'clock p. m. of the same day.)

AFTERNOON SESSION.

The Division resumed hearings at 2:15 o'clock p. m., whereupon the following proceedings were had:

MR. NORMAN MERRIMAN

having heretofore been first duly sworn, was recalled to the stand, and, was examined and testified as follows:

Mr. Clark: Mr. Merriman reminded me that he cannot remember where he was when the interruption came. Now, I have just been handed a copy of the transcript of this morning's testimony which I could hand him to read, but I suppose it would be better if the Reporter would read it.

The Member: Read the last part of what Mr. Merriman said.

Mr. Welch: We have a transcript here.

The Member: Oh. Well, Mr. Clark, suppose you read the last part.

Mr. Clark: Well, all right. Your Honor does not care to have the question read?

The Member: I do not want anything more than just to refresh the witness' recollection as to where he was.

Mr. Clark: Well, he is saying here, after the first few sentences:

"It is inconceivable to me that Mr. Prince, as president of the Maine Company, would give himself orders as president of the Jersey Company to transmit orders to the Union Stock Yards & Transit Company of which he was chairman of the board. It is inconceivable to me that any function of supplying advisory management by the Maine Company could have been conducted under an office expenditure such as is shown in the income tax returns in this case. The policy of the company has revealed in its—"

And then there is some interruption.

Then the witness resumes, after some discussion between Your Honor and himself as to prior years.

He says:

"The years prior to 1930, the same situation prevailed so far as my examination of those records went back for some years. I was reviewing this company in the critical years of the period and not reviewing its activities in 1915, or thereabouts, because I understood that this question would be asked with respect to these years and not with respect to its origin."

And then he continues.

"The record of income of the Maine Company shows that continuously for a considerable number of years, it accumulated surplus—"

And at that moment the interruption came.

Q. 98. (By Mr. Clark). Is that sufficient, Mr. Merriman, to refresh your recollection? *A.* Yes, sir. Accumulated a large surplus which was used as a possible financial reservoir for the emergency needs of the subsidiary and affiliated companies on certain occasions in 19—between '30 and '33, but which was used regularly as a source of financing the chief stockholder of the company, and also as a means of buying securities from him, which securities were not, in my opinion, of the general type that one would expect a large enterprise of this type to carry as a basic financial reserve.

I think that summarizes my reasons for considering this a holding company with no managerial or operative functions.

Q. 99. Now, in the same way, we were in the middle of your answer to a question, the precise form of which I have forgotten, as to the accumulated gains and profits of the Maine Company, and whether they were beyond the reasonable needs of the business.

Mr. Clark: Mr. Reporter, are you the one who took that record?

The Member: Mr. Merriman, don't you remember where you were?

The Witness: I remember just about where I was.

The Member: That is on the occasion when I interrupted to change my ruling as to a prior question.

Mr. Clark: I can find it here in the transcript.

The Witness: I was discussing the stability of the income of the Railway Company.

Mr. Clark: But I would just like to have it clear what question that is to which the witness is now continuing his reasons. Much has intervened.

Q. 100. (By Mr. Clark). The question was this—I find it in the transcript: "Have you formed an opinion as to whether in these same years the Maine Company accumulated gains and profits beyond the reasonable needs of the business?"

All right.

A. Yes, sir. I believe I had outlined the fact that this Railway property lease was made to the Chicago River and Indiana Railway Company, which became on the date of the lease a wholly owned subsidiary of the New York Central Railroad, having theretofore been controlled by Union Stock Yards & Transit.

The Chicago River and Indiana earning record after the date of this sale of stock and lease of property by the Railway Company in this case has been a very imposing record to indicate that this income is unusually secure and unusually stable.

A survey which I made some short time ago indicated that the two most profitable switching and terminal railroads in the United States were the Indiana Harbor Belt Railway and the Chicago River and Indiana Railway. The earnings of this company were in spite of the very severe depression that took place in the critical years of this period sufficient

to build up the cash position of the railroad from the end of 1930 at $917,000 to the end of 1933 of $3,321,000. At the same time, there was practically no change in the current liabilities of the company. The company had been earning sufficient to pay very large dividends to the New York Central on its stock, dividends which in some years ran as high as 500 percent.

The Interstate Commerce decision of 1928, which is in evidence in this case, shows that the operations had been highly profitable to the New York Central. The original Interstate Commerce decision showed that the Commission expected that the New York Central would obtain direct benefits of considerable value in addition to any earnings that it obtained from the operation of the properties, and in view of the fact that the railroad, the lessee of this property, which was responsible for the $2,000,000 a year rental, was earning a large surplus over requirements in the lean years in the history of the railroad business for many years back, I think that that source of income must be looked on as one of very unusual strength.

The Maine Company had another subsidiary. The Railway Company was not a subsidiary of the Maine Company; it was a subsidiary of the Jersey Company. But the Maine Company had a direct subsidiary, Produce Terminal Company, which was a utility company supplying electric light and power to the stock yards district of Chicago and to the Central Manufacturing District.

The earnings of this company showed the most remarkable and consistent growth during the period from 1920 to 1933, inclusive, of any utility company whose reports I have ever examined for that period of time.

The highest earnings of the company in its history up until 1932 were recorded in the year 1932, in spite of the fact that that was the extreme depth of the depression, and in

spite of the fact that this company's business was chiefly supplying the power to the industrial companies. So that it was to have been expected that as industry fell off this company's income would fall off, but it did not do so. In the year 1933, its profit, aside from the loss incurred in the banking—no—as a result of the banking situation was almost equal to that of 1932.

The earnings for several years ending in 1933 were about $350,000, and that company stood on the books of the Maine Company at the end of 1933—in fact, for the entire period—at a million thirty-two thousand total investment, although it was earning approximately $350,000 a year net and paying the Maine Company $200,000 dividends.

Q. 101. May I interrupt and ask whether or not that is the adjusted figure to which you have just referred?

The Member: What, the million thirty-five thousand?

Mr. Clark: Yes.

The Witness: Yes, sir; that is the figure shown on the adjusted balance sheet—the balance sheet adjusted in accordance with the stipulation.

Q. 102. (By Mr. Clark). Very well, then, proceed, Mr. Merriman. *A.* There was one other minor asset of the New Jersey Company which had exceedingly stable income and very high degree of safety, and that was the $2,500,000 bond issue of the Indiana Harbor Belt Railway owned by the Jersey Company, and that paid interest at the rate of 4 per cent; so that there was another $100,000 of extraordinary stable income.

Then I pass to the stability of income of the Transit Company. The Transit Company had in the year 1932 a large profit of a non-recurring character due to the re-weighing charges, which were taken in the income in that year. It could thereafter expect to receive additional income on account of the re-weighing services, but it could not look for

ward to more than perhaps one hundred seventy-five or two hundred thousand dollars a year of such additional income.

The Transit Company also had a large loss as a result of bank transactions, which loss, in my opinion, should be charged to surplus as a non-recurring item, just as I think the profit should be credited to surplus as a non-recurring item, because the losses that happened perhaps once in a lifetime from an extraordinary situation such as resulted in banking troubles of 1931 and 1933 I do not think should be regarded as influencing the regular income from the company's business.

Now, the income from the company's business had been showing a tendency to fall off modestly—not seriously, but modestly. That was due to various causes, but I think the major cause was undoubtedly the reduction in export of cattle from the United States to the rest of the world. In the period from, say, 1870, to the end of the war the United States had been a tremendous exporter of cattle to Europe chiefly, and to some extent to other parts of the world. A good share of that live stock went through the Chicago market and was shipped from there to points for trans-shipment by boat to Europe. The aftermath of the war developed the nationalistic policies of the European nations and their need for producing the maximum possible amount of their own foodstuffs, and consequently the export business in cattle declined very much, and the Chicago Stock Yards felt that more keenly than any other of the major stock yards in the West. That factor, I think, is pretty well completed as influenced by the end of 1933, since the cattle shipments of the United States conformed to such small proportions by that time and I believe that with a return to normal business conditions in the United States there would have been a tendency over the next few years for a slight increase in the earnings on the Transit Company's business rather than a

decrease, though on valuation basis I think it would be sufficient to consider that it was no better than a stationary trend. Nevertheless, it was a very different business from an ordinary manufacturing business, being a service business in an indispensable raw material of the food industry, and the entire record of the Transit Company's earnings shows a degree of stability which would be counted on by any corporation which was deciding its dividend policy on the basis of the stability of income indicated by its major earners. That I think is sufficient with respect to the stability of income.

Now, the surplus of the Maine Company by 1929 had been built up to a rather remarkable figure in view of the fact that the initial investment in the business was $1,000,000 in cash. The book surplus as of 1929 was $19,615,000, in round figures, as shown on these adjusted balance sheets. In 1930 that had risen to $22,184,000; in '31 to $24,142,000; in '32, to $25,915,000, and in '33, to $27,759,000.

Now, as I have stated, the balance sheet figure for Produce Terminal is completely out of line with any figure of value that I think it would be possible to assign to a business of that character. I think it would not be possible to value that business at less than $4,000,000 or four and a half million dollars. The investment—

The Member: You mean as against the $1,032,000?

The Witness: That is correct.

4. (Continuing) The investment in New Jersey Company common stands on the books at $10,933,000 at the end of '29, and slightly more than that in 1930. And this figure of the New Jersey Company asset value on the books does not give effect to the remarkable change that has taken place in the last 20 years in the basic—in the value of the most important asset of the New Jersey Company, which I conceive to be the Railway stock. If one treats the Railway enterprise as

a whole it does not split the income between the Railway Company and the Transit Company.

I have reviewed the earnings of the Chicago Junction Railway Company in the years prior to the execution of the lease to the Chicago River and Indiana in 1922, and it should be noted, I think, that in 1913 that property, the bulk of that property was leased by the Transit Company for $600,000 a year, and there was a small amount of additional property owned by the Chicago Junction Railway, and in 1922, nine years later, that entire property was leased for $2,000,000. That is a gain in income for the properties represented by those Railway properties of a gross of $1,400,000, approximately. It should be noted that at the time of that lease, the first lease that fixed a rental to the Transit Company, that the earnings of the Junction Company had previously been set on a two-thirds and one-third basis, two-thirds of the earnings going to Transit and one-third of the earnings to the Railway, and one-third of the earnings to the Railway on that basis would have indicated an expectation of earnings of $300,000 a year, on the assumption that $600,000 was a reasonable rental to the Transit Company. That would then make the net gain in income from that source around $1,100,000 in the period of eight years, and I do not think that the Jersey Company stock on the balance sheets reflects that remarkable gain in income in any fashion whatever.

The cash of the Maine Company—

The Member: Well, how would you reasonably think it should be reflected?

The Witness: I think it is a factor in considering the dividend policy, the increase in income and the increase in value of the holdings as a factor that would always be considered by—

The Member: Well, I am not asking you that. You say that the increase in the income has not been reflected upon

the balance sheet of the New Jersey Company. I am asking you how, in your opinion, it should have been reasonably reflected upon the balance sheet of the New Jersey Company.

The Witness: That implies no criticism whatever.

The Member: I am not talking about that.

The Witness: As to the balance sheet.

The Member: How should it have been reflected, in your opinion?

The Witness: I don't think it should be reflected. I think that except in case of a recapitalization of the Maine Company or a reappraisal of those assets, that it should be continued to be carried at the book cost.

The Member: What is the significance, then, of your statement that that is a factor which has not been reflected upon the balance sheet of the New Jersey Company? I assumed when you spoke that you thought that that was a significant fact.

The Witness: I do think it is a significant fact, that one of the major assets has perhaps appreciated in value ten or fifteen million dollars, and that that is not shown on the balance sheet.

The Member: I take it, then, that you think that if there were a correct representation upon the balance sheet of the value, that that would increase the asset side of the balance sheet by $15,000,000; is that it?

The Witness: That was just for illustration, that $15,000,000, but it would have been a very large increase in the asset item on the balance sheet had they in each year valued their holdings in these subsidiary companies at a fair market value instead of at book cost. And I think a board of directors in determining a dividend policy should consider whether the assets have shrunk or whether the assets have increased. And that will not be reflected on the balance sheet unless adjustments are made for the internal purposes of

the directorate, and they need not be made on the books of the company until there is a final sale of the property or something of that kind.

The Member: Well, have you an opinion as to the—I am leaving out of consideration any question as to whether it should actually have been stated on the balance sheet, but let's treat it as something that intelligent people would recognize, even whether it is on the balance sheet or not. Have you an opinion as to the extent to which there would be a fairly recognizable increased value of the cost assets over and above the balance sheet assets if a proper recognition had been had of this increased earning from that source.

The Witness: I expect to be asked a question by counsel with respect to the valuation of one of these major assets, Your Honor.

The Member: All right. I want to have the reflection of the assets stated somewhere. If I am anticipating, I will quit.

The Witness: Yes, sir.

In addition, I might comment that the companies' own 5 percent bonds in the treasury of the company were being carried at the end of 1933 at $3,165,000, in round figures, and that their par value was nearly a half a million dollars above that figure, and had the companies seen fit to retire those bonds, it would have had that additional gain to its surplus, since they were a liability of the company.

Now, in consideration of the surplus position of the Maine Company, I think it is important to observe that in spite of the losses incurred in the banking—as a result of the bank situation during this entire period the surplus of the individual companies, whose balance sheets have been introduced in evidence, such individual companies underlying the Maine Company, showed practically no change in the period from 1929 to 1933; three of the companies showed a small increase

in surplus totaling altogether $1,512,000; and three of them showed a decrease totaling $1,500,000. So the subsidiary companies' surplus changes during the four-year period from 1929 to 1933 were nominal.

Now, for the year 1930 the subsidiaries showed a net increase of $482,000; for the year 1931, a net increase of $231,000; for the year 1932, a net increase of $1,770,000, and that is the year in which the very large re-weighing charges were taken in the income; and in the year 1933 there was a decrease of $2,462,000.

The cash position of the company, taking only two major items from these balance sheets, we have the cash and other notes receivable. Those other notes receivable were chiefly notes receivable from F. H. Prince or F. H. Prince & Company, brokerage firm. The totals of those two items were $9,793,000 at the end of 1929; $11,157,000 at the end of 1930; $11,204,000 at the end of 1932; and $12,213,000 at the end of 1933. That does not include the subordinated cash.

Now, this company at the time that these cash resources of the parent company were piling up, and at a time when it had already accumulated very large amounts of surplus—I think I should say at this point I feel the position of this company at the end of 1929 indicated that it had built up more than adequate reserves to take care of such things as reasonable business men would expect might confront this particular company.

And at the time that these loans were made to the companies' chief stockholder in 1930, and to a minority stockholder in 1932 and 1933, they were made at the interest rate when it was possible to buy in the companies' own obligations, or the obligations of its important subsidiaries, at, in general, a very substantial discount below par. And I think that dividends to its stockholders would be a more logical policy than loans to stockholders that bore substantially less interest

than could be obtained by the retirement of the companys' own securities.

In that connection, it should be commented that the company had one subsidiary company that was in a bad position.

The Member: Mr. Merriman, will you be more specific in these identifications of people and events that you are talking about? I do not want a doubt left as to whom you are referring and to what you are referring by using abstract general terms.

Now, what is this subsidiary company you are talking about? Which company?

The Witness: Well, I was just about to mention the name.

The Member: Well, as to the loans made to so and so, without saying who it is, I would have to suspect that you mean F. H. Prince or F. H. Prince & Company.

The Witness: The loans were made to F. H. Prince and F. H. Prince & Company, which, I understand from the record, is an investment banking firm for Mr. F. H. Prince.

The Member: Now, I will ask the Reporter to go back to the place where he is referring to a combination of cash and receivables, and then there is some talk about the person from whom these receivables were held. That is what I want to get. I want to get a specification of just exactly what it is you are talking about, and I do not want to have to do it by inference if you can give it to me by specific reference.

(The record was read.)

The Member: That is what I mean, the company's chief stockholder was F. H. Prince.

The Witness: And Mr. F. H. Prince was minority stockholder in 1932, when F. H. Prince & Company, Inc., acquired by gift from Mr. Prince 60 percent of the stock.

The Member: Will you just bear in mind the fact that I want these identities shown as you go along.

The Witness: Yes, sir.

What was the last?

(Last answer read as follows:

"In that connection, it should be commented that the company had one subsidiary company that was in a bad position.").

The Witness (Continuing): This is the Elevated Company, which was leased to a company which was succeeded by the Chicago Rapid Transit Company. The earnings of the Chicago Rapid Transit Company had been on the down grade for a number of years prior to 1932, and some time in 1932 it defaulted on its obligations.

The New Jersey Company guaranteed payment of principal and interest on the four percent bonds due 1945 of that Elevated Railroad Company in the sum of $2,327,000, and as guarantor it had, I think, at that time, every reason to expect that it would be necessary to continue to make good on that guarantee for some time. Therefore, in view of the fact that the bonds in 1932 had 13 years to run, and since they could have been bought at—the same volume—at prices in the neighborhood of 80 or even perhaps as low as 65 to 70, I believe it would have been sound business policy to acquire those bonds instead of piling up cash in surplus, which was earning much less than could be obtained by the investment in the obligation that was guaranteed by the company's chief subsidiary, the Jersey Company.

I think that summarizes my reasons for feeling that the company did not distribute its gains in accordance with—that the company accumulated surplus beyond the reasonable needs of the business.

Mr. Clark: I would like to correct myself, Your Honor, for the purpose of clarity of the record. When I stated the question, to which this was a continuation of response, I stated the question as to whether or not the witness had formed an opinion as to the Maine Company having accumu-

lated gains and profits beyond reasonable needs. As a matter of fact, of course, this is an answer to a question for his reasons for the statements which he gave.

The Member: You understood that, did you not, Mr. Merriman?

The Witness: Yes, sir.

Mr. Clark: I just mention that so that the record will be clear.

Q. 103. (By Mr. Clark): Just let me ask at this point, Mr. Merriman—I do not know whether that has any bearing on this particular answer, but I am afraid I will forget to ask it:

In the course of your preparation of this testimony, did you actually go to Chicago? *A.* Yes, sir; I did.

Q. 104. And did you make an investigation of these premises? *A.* I went to Chicago to get what I might term a bird's eye view of this enterprise, not for the purpose of making a detailed appraisal of any of its properties, but for the purpose of familiarizing myself as to the type of operations, and particularly the Central Manufacturing District, on which the record was very sketchy.

Q. 105. And you made that investigation? *A.* Yes, sir.

Q. 106. What is your understanding as to the character of the interest of the Maine Company during the years 1930, 1932, and 1933 in the common stock of the New Jersey Company which it then held?

Mr. Welch: I object to that. There are two or three things in the question that calls possibly for a characterization, and, therefore, I fear it.

The Member: Well, I think that is true. What the character of an interest is, I don't know.

Mr. Clark: I can tell you, Your Honor. We have had a great difficulty in drafting these questions really to this point for the reason that it is not merely the stock which is held by the Maine Company but there is also an added incre-

ment due to the contract of 1911, and the agreement of 1914 and the plan of 1911, which are an interest, and in evidence. I think if Your Honor will permit this to go in, and then if it seems that it is immaterial, a motion to strike will be properly in order, but this is the only way that I could figure to approach it. There is more than just the ownership of stock.

The Member: Well, can you make clear to the witness that you are not asking him for a legal characterization of the interest? If there is some kind of characterization that is within the peculiar field of this witness, assuming that he is an expert, I should think that he could answer it, and that, for example, would be illustrated by the use of the word "vernacular" by the previous expert witness. But, on the other hand, if there is any doubt about whether the witness is attempting to give a legal characterization about it, the question might be fatally vulnerable.

Mr. Clark: Well, he is not going to, Your Honor.

The Member: Well, if you will ask him to exclude a characterization, maybe I can let it in.

Mr. Clark: Well, I do ask you, Mr. Witness, to exclude any legal characterization in your answer.

The Member: I will overrule the objection on the question as so qualified.

Mr. Welch: An exception.

A. As I understand, the interest of the Maine Company in the New Jersey Company is evidenced, first by its holdings of common stock in that company which in the important years—in the years in question, was nearly 60,000 shares, and on the average 60,000. The company also appeared to have a contractual right to receive income from the New Jersey Company, that is, the Maine Company had this, by virtue of the contract of March—of 1914. I don't remember the exact date. And by virtue of the relinquishment of the right of the common stockholders of the Jersey Company to

receive that income in exchange for the 9 percent guarantee which the Maine Company gave in 1911 and thereafter to the New Jersey stockholders as set forth in the 1911 agreement.

This contractual right of the Maine Company is set forth in Exhibit S-46, attached to the stipulation, and, frankly, Your Honor, I am not sure whether the Maine Company owns common stock solely, and this contractual right is of no importance aside from the stock, or whether there is a marked difference between the value of the contractual right and the stock, and that is outside of my province to decide. I might undertake, as I expect to be asked, the value of both, but I wouldn't undertake to value the one separately from the other because of a lack of certainty of the legal status.

Mr. Welch: Well, if Your Honor please, if it adds anything to the gaiety of the nations or the proof on either side, I am surprised, but I don't think I will move to strike it. It doesn't seem to me that we have learned anything that we didn't know before the answer was attempted.

Q. 107. (By Mr. Clark): In the light of your examination of the stipulation, together with the exhibit attached thereto, the exhibits introduced by both parties at this hearing, and the other evidence of record in the case, and your special training and experience, have you formed an opinion as to the fair market value of this interest of the Maine Company in the common stock of the New Jersey Company held by it on December 31, 1930, 1932, and 1933; and let me add in that regard, Mr. Witness, that you may consider for the purpose of your response the term "fair market value" to mean the price at which a seller willing to sell at a fair price and a buyer willing to buy at a fair price, both having reasonable knowledge of the facts, will trade. *A.* I have.

Q. 108. Will you state your opinion in this regard? *A.* In my opinion, this stock, assuming it to be coupled with the contractual right to which I have referred, if there is any

separate identity between the two, is worth, in round figures, $23,400,000 in 1930; was worth, in round figures, $19,750,000 in 1932; was worth $20,200,000 in 1933, at the end of those particular years.

Q. 109. Now, will you state your reasons for arriving at those figures?

The Member: Now, may I interrupt to inquire as to what the figures are that are on the balance sheet of the books which these valuations would supplant if they were reported?

The Witness: Yes.

The Member: Twenty-three, nineteen, and twenty millions; isn't that right?

The Witness: Yes, sir. They would supplant valuations—the 23 million valuation would supplant a valuation of $11,036,509, in 1930; a value of $11,193,549 in 1932; and the valuation of $11,241,352 in 1933.

Q. 110. (By Mr. Clark). Now, then, I will renew the question. Will you please state your reasons for arriving at those figures? *A.* I have already commented as to the unusual stability of income of the New Jersey Company's chief subsidiaries, the Railway Company, and the Transit Company. Now, in searching for a rate at which to capitalize this income of a decidedly stable character, my first step was to take the prices that the—yields, rather, that were obtainable on high grade bonds at each of these year ends, and I have taken as a base from which the valuation is to be constructed, the yield on triple A bonds as published by Moody's Investors Service in December 31, 1930, of 4.47 percent; 1932, 4.51 percent; and 1933, 4.33 percent.

Taking bonds of a grade somewhat below, two steps below the triple A bonds, Moody's index similarly shows 5.36 percent for 1930, 6.47 percent yield for '32, and 6.05 yield for '33.

The Member: Those are composite yields, aren't they?

The Witness: Those are composite yields of 30 bonds of that grade, Moody's rating being used.

The yield obtainable by an investor on high grade industrial preferreds as of those same dates—I beg your pardon; these are the averages for the month of December of 1930, '32, and '33, using for that purpose the Standard Statistics Index of high grade industrial preferred stocks, which were, respectively, 5.77 and 9.34—or 7.34 in '32, and 6.50 in '33.

Now, income as stable as this income, which has in front of it a fixed charge due to a bond issue and a charge for a preferred stock dividend is entitled, in general, in my opinion, to about 50 percent increase over the yield that is obtainable on bonds of the company that have a rating of BA. This is an empirical solution of a valuation of property. I cannot give a demonstration of its validity, but I think it is common sense to say that if a company is reasonably capitalized and its bonds sell in the open market to yield 5 percent, that the investor in the common stock of that company, assuming there is no preferred in the picture, would expect that he would get around 7½ percent, if it is a corporation that is reasonably capitalized.

Now, on that general basis, I have projected a series—projected times earnings ratios for this New Jersey common stock interest of 11½ times earnings for 1930, taking 11½ times the latest year, rather than 11½ times the preceding five-year average; there would be virtually no difference between the two figures—for 1932, in view of the fact that medium-grade bonds and preferred stocks were selling to yield 6 to 7 percent, I have taken ten times earnings, which is a capitalization rate of 10 percent for this income, and in 1933 I have taken 11 times the earnings in each case, taking the earnings for the latest years as perhaps being more representative than the earnings of any series of preceding

years, since a series of preceding years would produce a slightly higher earning power.

Now, these figures—

The Member: Did you say that for 1932 you took a valuation of 11 times earnings?

The Witness: Well, 10 times earnings for '32 and 11 times for the end of '33.

The Member: Eleven times for '33?

The Witness: Yes, sir. The reason—

The Member: I thought you said before, and I am trying hard to keep abreast of you, but it isn't easy—I thought you had said before that you were speaking of a basis of something over 11 percent, and I hastily figured from that, that that would mean you were taking pretty close to a nine percent times capitalization rate, and now you are doing just the opposite. You are taking eleven times earnings, and I am confused. Perhaps you had better straighten me out on that.

The Witness: These capitalization rates work out in percent, roughly, nine percent in '33, ten percent in '32, and eight and a half percent in 1930. That is rough there. About 8½ percent in 1930. I haven't actually calculated those. I have just put them down on a times earnings basis.

I. (Continuing) I have reviewed a large number of major and some less important companies in various classifications to find what price earning ratios their stocks were selling for in 1930, '32, and '33. I might say that the one and a half times earnings of Jersey compares with 11.3 times for Union Stock Yards of Omaha. For Denver Union Stock Yards, the ratio is 13.6 times earnings as against 11½ that of Jersey. On the other hand, Sioux City was 8.7 as against 11½. The two approximately balance each other.

The capital market at the end of 1933, I think it should be stated, was decidedly better than it was at the end of

1932, at which time we still were in an era of banking difficulties, and there was a considerable degree of depression, of sentiment, although I do not think things were as blue as they were in the summer of 1932, when we had BAA bonds—

The Member: BAA bonds?

The Witness: Yes—down to about 12½ tc 15 percent basis, and there were a good many of them sold on a 20 years' yield, but there was a very striking recovery in the beginning of the month of July of 1932, which carried up to September, and then there was a slow sag-off to December, but the December, '32, prices of bonds, preferred stocks and high grade common stocks in general were very substantially above those of the low points of 1932.

The end of 1933, we had the banking situation pretty thoroughly cleared up with the Government guaranteeing on bank deposits of the type that the mass of the public worried about, I think the limitation at that time was $2,500, but I am not quite sure at this date. We had a quite notable come-back in industries, and a reasonable come-back in commodity prices. And conditions were decidedly more cheerful at the end of 1933, but one certainly couldn't call them buoyant. But interest rates on high-grade bonds at the end of 1933 were down to a lower point than they were at any time at any year end for quite a number of years past, and the yields obtainable on the basis of current earnings of industrial stocks that were engaged in businesses of a definite stable character were, generally speaking, substantially less than the yield that I have capitalized this Jersey stock at.

The Member: Were there any companies that had earnings of a definite stable character at that time?

The Witness: Any businesses? Or bonds?

The Member: Any businesses that had earnings of a definite stable character at that time? I suppose that everything was unstable then.

The Witness: We had a much greater degree of stability in the food industry, for one, than we had in the mass of manufacturing industries. As No. 2, you had a much greater degree of stability in the utility business, and, particularly, in the utility business where the companies catered to residential communities rather than to industrial territories.

We had a quite remarkable stability of earning power on the part of some railroads, certain of the coal railroads, Norfolk & Western, the Virginian; the Chesapeake & Ohio held their earning power exceedingly well during the depression due to the vital necessity of the transportation of bituminous coal for electric light and power producers.

There were, of course, a very considerable number of guaranteed railroad stocks, and where the guarantors under the lease, or the operating companies, either one, were earning substantially more than charges under those leases the yields were decidedly low in comparison with some of the speculative bonds that I am speaking about.

The Member: We will suspend now and take a short recess, and I will ask you, Mr. Witness, to keep in mind where you are so that you do not have to go through this business of refreshing yourself.

(There was a short recess taken.)

The Member: Now, can you pick up where you left off, Mr. Merriman?

The Witness: Yes, Your Honor.

I was speaking about railroad stocks of companies which were operated under lease by other railroads, and I have checked the yields on all such stocks as have an important public market, as well as the earning record of the company guaranteeing the lease, if that information is available.

At the year ends in question the better grade of such securities was selling at about 17 times earnings for the year 1930; about 15 times earnings for the year ending December

31, 1932, and about 16 times the year ending December 31, 1933.

Your Honor asked me if there were any other classes of companies which had relatively stable earnings. I have mentioned first the stock yards—

The Member: No, my dear sir, I did not ask you that. I asked you whether they had stable earnings. I did not say "relatively." I notice that your answer was entirely couched in terms of relativity. I can well understand that there were earnings which were more stable than other earnings, but I was referring to the general condition of affairs in the country at that time and asking, perhaps flippantly, as to whether any earnings were at that time properly to be regarded as stable.

The Witness: I think the earnings of the flour milling companies, some of the major ones, like Pillsbury, were quite stable. The earnings of the cigar companies were at least reasonably stable. And the earnings of quite a number of coal mining companies were quite definitely on an increase, and their securities reflected it.

I think that would summarize the valuation study, at least the high spots of the valuation study that I made with respect to this particular interest of the Maine Company in the New Jersey Company.

The significance of that, as I understand it, and a factor for consideration in this case, is that thus is it disclosed that the earnings and profits of the Maine Corporation were free for distribution to a greater extent than a mere examination of its balance sheets disclose.

The Witness: Yes, sir.

The Member: Is that right?

The Witness: I believe that is part of the issue.

The Member: I say, that is the significance.

The Witness: I think there is another significance that counsel has in mind.

The Member: I can find out from you what the significance is with respect to the opinion which you have formed and have undertaken to express here as to the reasonableness of its accumulation. You were asked to explain that, were you not?

The Witness: Yes, sir.

The Member: So I want to put this into the mosaic of your explanation of your answer to that question.

The Witness: Yes, sir.

I believe, however, it has another significance. I am not qualified to say that, because I am not too familiar with why this valuation question—why I was asked to answer this valuation question.

The Member: Oh, you are not answering, then—

The Witness: It has a dual significance, as I understand the term.

The Member: Well, I will let him state the significance from his standpoint. I thought that it had a significance from your own expert standpoint.

Mr. Clark: Well, to offset shrinkage in assets, Your Honor.

The Member: I beg your pardon?

Mr. Clark: To offset shrinkage in assets, Your Honor, which is claimed, and which is admitted to a certain extent.

The Member: You mean this blue line (indicating) in the last 3 years of this Exhibit 45, shrinkage of those assets?

Mr. Clark: Decline in other assets, on balance sheets, Your Honor. Reference was made in the stipulation to some of that.

The Member: How elusive that statement is to me, when I am trying to understand its immediate present signifi-

cance. That is not an unfair question for me to ask, or an unfair demand for my mind to make, is it?

Mr. Clark: Well, I am not criticizing that in any way, Your Honor. What I wanted was to make a little clearer. The bank loans were subordinated, which represents a decrease in assets.

The Member: Yes.

Now, the witness has taken that into consideration,—at least, he said so. When he spoke about the cash position and the loans he expressed that and he subordinated assets in their place.

Mr. Clark: Yes. The Maine Company also has subordinated assets.

The Member: Yes.

Mr. Clark: But those were not so dealt with by the witness.

(To the witness:) Were they?

The Witness: Yes, they were.

Mr. Clark: I withdraw the remark.

There is something now which I am reminded, and that is the value of these bank loans. As I recall, they have attempted to show, and perhaps with justification, that they were not worth the amounts which were advanced,—the bank loans, I mean, made by the Maine Company to the Chicago banks.

The Member: Well, now, this requires an awful lot of building stone on stone to get its significance.

As I understand it, then, and all I am concerned with at the moment, is the significance of this so-called hidden reserve represented by a valuing of these shares over and above the valuing which appears upon the books. Whereas upon the book value—you say the book value is not significant because there is an actual value that does not appear upon the books, irrespective of whether it should be

upon the books of the Maine Company or off the books; and I suppose that the significance of that was that that rate of value, which seems to be in the amount of somewhere from seven to eleven millions of dollars, the significance of that is to show that the earnings and profits which have been permitted to accumulate by this particular taxpayer corporation are in excess of the reasonable needs of the business, because there is eight to eleven million dollars more somewhere that has not been referred to.

I asked the witness whether that was what the significance was, and then he said that is one of the significances, but that you had another one, and now I thought you were going to tell me what the other one is.

Mr. Clark: Yes. I said the shrinkage, Your Honor.

The Member: It really comes to the same thing, does it not?

Mr. Clark: Well, perhaps.

The Member: It is merely a greater specification of the same doctrine, is it not?

Mr. Clark: Well, I think perhaps that is true.

Mr. Pierson: If Your Honor please, may I be permitted to make a statement in regard to that at this time?

The Member: Yes.

Mr. Pierson: In addition to that I think also there is this feature: The valuation of the New Jersey Company's common stock on the balance sheet of the Maine Company is being introduced in evidence here to show that there are assets on the books which have increased in value throughout these years, at the same time when they have assets on the books which have decreased, and I think admittedly decreased. Respondent does not say that those bank loans are worth the amount stated on the books; and it is for that reason that we introduce this evidence, to show to the Board that there is the offsetting item; so that it must be

considered in the light of the financial structure and condition of the corporation.

The Member: And that the forthcoming burden of 1940 is therefore not as great as they contend that it is, because they have got much more with which to cope than their books indicate that they have.

Mr. Pierson: Exactly so, Your Honor.

The Member: All right.

Q. 111. (By Mr. Clark). Have you considered this chart here, Mr. Merriman, which is marked "Petitioner's Exhibit 45," and which I hand you—I see you have before you a miniature. *A.* Yes, sir.

Q. 112. Have you given consideration to that? *A.* Yes, sir; I have.

Q. 113. And have you read the testimony that was introduced regarding it? *A.* I heard all the testimony that was introduced.

Q. 114. Will you please state your conclusions as to the correctness of that testimony and the accuracy of the chart.

Mr. Welch: Objection.

The Member: I will sustain the objection.

Q. 115. (By Mr. Clark). Well, what consideration have you given to this chart? *A.* I have felt that the chart should show the situation of the Chicago Stock Yards enterprise a great deal better than it does—

Mr. Welch: Objection.

The Witness: —if there was something added to it.

The Member: Wait just a minute. I will hear you on the objection.

Mr. Welch: I beg your pardon?

The Member: I will hear you on the objection.

Mr. Welch: He was asked what consideration he gave to this chart, and he started out with something in the nature of a criticism. I ask that the answer be stricken.

The Member: I think that is true.

I think, Mr. Clark, that you have to be more specific as to the question.

Q. 116. (By Mr. Clark). Well, what was the result of your consideration of this chart?

Mr. Welch: Objection.

The Member: Sustained.

Q. 117. (By Mr. Clark). Is there any addition which you think ought to be made to or subfraction from the elements which appear here on this chart in order to have it correctly reflect the statements which were made regarding it in the testimony of the witness for the Petitioner?

Mr. Welch: Objection.

The Member: I think you have got to be more specific than that.

I sustain the objection.

Now, do not think a witness can go on the stand and have blanket authority to say the chart is wrong, and this is why.

Q. 118. (By Mr. Clark). I call your attention to these lines here and the figures and ask you if you understand what they represent. *A.* Yes, sir.

Q. 119. Well, now, will you describe what they do represent to your understanding?

Mr. Welch: Just a moment. Let me consider that.

Well, go ahead.

The Member: Now, he has read it, and he is an intelligent person, so far as to this Court appears, and he knows what this red bar means as to each year, and he knows what this blue bar means as to each year. Now, let us find out whether there are factors or items which have in fact been omitted from the red bar or have been omitted, in fact, from the blue bar, so that he may state specifically which

items should be added to represent the assets of the blue or should be deducted from the liabilities of the red.

Mr. Clark: Well, that is what I thought.

The Member: I think you should be required to go in step by step that way so that your adversary can make his criticisms and objections as the witness' criticisms of the chart come up.

Q. 120. (By Mr. Clark). Well, I want to ask you, Mr. Merriman, what factors were included in the red bars—

Mr. Welch: Well, now, that would take a long time. Presumably, Mr. Green has answered it correctly. For the sake of brevity, why don't you ask him what he would put in that isn't there and what he would take out that is there?

Mr. Clark: That is what I did, and there was an objection, and the objection was sustained.

The Member: I don't think you did, but maybe you thought you did. I don't think you did, Mr. Clark.

Suppose you ask him that as to the red bars, and then ask him that as to the blue bars, and maybe we have a commitment of the other side that they are not going to object to it.

Q. 121. (By Mr. Clark). Well, what factors were included in the red bar, if any, or were excluded from it which, in your opinion, should have been excluded or included?

Mr. Welch: Objection.

The Member: I will permit that question to be answered.

Mr. Welch: Could I state the basis of my objection? It is so confusing, the double end of it.

Why don't you first have him tell what is in that should not be in, and then take up those that should be out. I am afraid we will get our minds all mixed up.

The Member: I have got to rule on these according to the substance of the question that is asked and not according to what you regard as a nicety of its form.

Mr. Welch: Go ahead.

A. The red bar, I think, is an entirely accurate representation of the requirements of money for the ultimate discharge of the funded debt represented by bonds, and the amount necessary to liquidate the New Jersey Company if it is found necessary to liquidate or desirable to liquidate the New Jersey Company.

The blue column is entitled on the chart "The resources to meet such requirements," and that blue column in effect represents the cash and current assets of the companies in question: that is, the Chicago Stock Yards Company, the Maine Company, and the underlying companies of the enterprise. Now, I do not think that at any time the cash resources are the sole or the proper measure of the resources to meet long-term financial requirements. I think that blue column might be divided into two parts. I mean, it might have an addition to it that would be given another column—given another color, or that would show the other tangible assets that are favorable to meet such requirements. Further, I think this chart without a picture of the surplus earnings over and above the annual fixed charges on them—it lacks something without that figure. In the early days of the formation of this company—

The Member: I think before I can really understand what you are talking about as to the blue column, perhaps I had better get a statement from you, and this goes back to Mr. Clark's question that was objected to, and maybe objected to when I asked—a statement from you as to what the blue column does comprehend. As I understand from you, it doesn't comprehend enough, and, therefore, I want to find out from you what you think it does comprehend.

The Witness: It comprehends, using the shortest term that I can use to describe it, the cash and other current assets, marketable securities, loans to Mr. Prince, and in-

vestments of a grade like the Indiana Harbor Belt Railroad investments, of not only the Maine Company but of all the subsidiaries in this enterprise all put together in one sum which makes up the figure of a little under 20 million dollars in the last two years of the period, and a little over 20 million dollars in the preceding two years of the period.

The Member: Does that mean that you regard the blue column as comprehending only quick liquid assets?

The Witness: Yes, sir.

The Member: And it does not include fixed assets?

The Witness: That is correct, sir.

The Member: Of a more durable nature?

The Witness: Yes, sir.

The Member: That is your first complaint about it, isn't it?

The Witness: That is my first complaint. Now, that is my only complaint to the columns. My second criticism is that to draw a conclusion as to the stability of this enterprise or its ability to refinance any of these obligations, it is necessary to have a visual representation of the surplus over fixed charges that is being and has been earned by this company over a period of years past, and I have taken the net income of the Maine Company from 1914 to 1933 as shown in the stipulation, and added that figure to the chart as a rough measure of the surplus over fixed charges on the total of these red columns in order to see how much was being earned on this funded debt.

The Member: When you say "surplus," do you mean book surplus?

The Witness: No, I mean the net income after charges of the Maine Company.

The Member: As per books?

The Witness: As per books; yes, sir.

The Member: And you don't intend to include in that surplus any valuation?

The Witness: No, sir.

The Member: That you may make?

The Witness: No, sir.

The Member: Outside of the books?

The Witness: That is the current annual income of the Maine Company, and that figure upon the scale on the basis of one-tenth of the original scale shows pretty clearly to me that beginning about 1922 this enterprise became a strong enterprise. Prior to that time it had been a very thin margin operation, and that its earnings were, in general, sufficient to provide everything that was necessary to refund any obligations that it might have maturing in 1940 either by virtue of the liquidation of the New Jersey Company or by virtue of the maturities at that time.

Mr. Clark: I am sorry that I have at this moment but one copy of this. Mr. Merriman has just drawn it up yesterday. I want to offer it in evidence, but I will supply other companies.

Mr. Welch: I think I would like Mr. Green to deal with the chart, if he will. I don't know that I should begin dealing with it, but it strikes me that the witness has tried to marry earnings to a pure statement of assets and liabilities, and I don't see how that marriage could be represented on this chart.

Mr. Clark: Well, he has stated, Your Honor, what he has done.

Mr. Welch: I don't understand it.

Mr. Clark: If it is erroneous, that can be brought out in cross-examination.

Mr. Welch: I can't bring out on cross-examination a device of something that I don't understand. I don't under-

stand marrying earnings to a chart of assets and liabilities. I am perfectly willing—

The Member: Well, that may be your misfortune.

Mr. Welch: I am willing that Your Honor should see the result that he has, and if it seems understandable and helpful to you I certainly won't object to it.

The Member: I do not find it understandable and helpful to me now in order to rule on the objection.

Mr. Clark: Well, I will offer it.

The Member: But from what has been said, I see no reason to exclude it. I will overrule the objection.

The Witness: Off the record, Your Honor.

(The witness made a remark off the record.)

The Member: Can't you say that for the record?

The Witness: Exactly what the blue line is has not been labeled. The blue line represents the net income over charges and expenses of the Chicago Stock Yards Company as taken from the Exhibit S-51 attached to the stipulation plotted on the scale of ten times that used for the plotting of the assets.

The Member: Now, let this be marked in evidence with the exception to the Petitioner.

The Clerk: Marked RRRR.

(The document so offered and received in evidence was marked "Respondent's Exhibit RRRR," and made a part of this record.)

Q. 122. (By Mr. Clark). Do you have any further testimony relative to this? A. No, sir.

Mr. Welch: Objection. Oh, O. K.

The Member: Well, I want to understand it, Mr. Clark, if you are through with it.

I mean, have you said everything you want to say about it?

Mr. Clark: Yes, sir.

The Member: Well, then, let me ask the witness one or two things to understand it. I am not sure that I do at all.

My first thought when I heard you on this subject, Mr. Merriman, was that I expected you to do with this exhibit No. 45 was to show how the blue columns should have been enlarged, the effect of which would have been to bring the tops of the blue columns closer to the tops of the red columns and thus to show the relation between the demands upon the company and the resources with which those demands could from year to year be met, which, as I understand it, was the theory upon which the chart No. 45 was designed to expound.

Now, was I correct in my expectation of what your change would disclose?

The Witness: Yes, sir; in part. However, I merely let that pass in my original statement by commenting on the fact that the title said that that was the resources to meet these requirements, and, in effect, it is the quick assets. They are resources in the form of quick assets that are available to meet those requirements. Now, that sort of a representation I think is perfectly proper. I think if one wanted to use the title that is used in that heading he should include all of the assets and not just the quick assets. But I think the earning power is the most vital single thing to look at in any corporation, because values of assets on the books may be great or small depending on whether they have greater or smaller earning power. At the time the Maine Corporation was formed and shortly thereafter, the company had a very small surplus over the fixed charges

of the parent and subsidiary companies as shown by that red line—the fixed charges on the total of that red line, I should say. And about 1920, '21, '22, they began to have a very substantial surplus over the fixed charges, so that that very surplus in and of itself, when you consider that there is added underneath that blue curve that I have put on the chart, the amount of the fixed charges to show what is available to meet the interest demands that would come about as a result of the debt and other obligations represented by the red column, you have a very imposing lot of earnings available to meet those charges, and, therefore, you would have no difficulty in refinancing.

The Member: Well, I will let the Petitioner clear that up.

Mr. Clark: You may cross-examine.

Mr. Welch: Shall I start my cross-examination?

The Member: If you will.

Perhaps there is just one question that I would like to get my own mind clear on before you start, and that is as to this term which you have used and which has also been used by others. What is the meaning as you have used it of the term "cash position"?

The Witness: I have used it in the sense of assets that are either cash or quickly realizable.

The Member: Well, now, what is your understanding of the fact as to what is meant as to this company, when you speak of its cash position? Did it have cash? Where was this so-called cash? What was the form of it?

The Witness: If I may have the exhibit, the exhibit that was introduced into evidence that is the foundation for this table, I can more quickly give you the answer.

There is the cash of the Maine Company, the Jersey Company, and of all the other subsidiary and affiliated companies. There are certain bonds and investments owned by these companies that have a ready market, and the totals of those companies are included, as I understand it, in the total of that blue column, together with the cash, and there may be certain other cash—certain other items which can be quickly turned into cash such as accounts receivable that are included in there. I believe they are included—there is a great deal to remember in this case, and I read the record about this this morning, and I am still not quite sure, but we have, taking the year 1933, we have the cash accounts receivable, notes receivable, Central Manufacturing District 5's, and other investments of the Maine Company, making a total of $13,903,000, in round figures.

The Member: Of which how much was cash?

The Witness: $7,645,000, and notes receivable were—

The Member: Well, I don't care about that. I want to get in my mind a clear conception aside from book figures and aside from just talk what this cash is. It isn't money in a sock, is it? It isn't cash? It isn't so many dollars in currency. Now what is it?

The Witness: I presume it is practically all cash in banks of deposit of the Maine Company and its subsidiaries, the cash that is taken in.

The Member: Well, you see, what I have in mind is this: If, let us say, in 1933, in February, you had cash in the till, that is one thing, but if you had cash on deposit with some of the banks of the United States it was one thing quite different than from what it was on deposit in other banks of the United States, because in March, 1933, there was a great deal of importance attached to which banks you had it in.

So the security—or, to get away from a technical word—the assurance of the usability from day to day, week to week, month to month, and year to year of a so-called cash position might have been different if its actual character or if the actual conception of cash position was one thing from what it would be if it were something else; and that is the reason I have been in sort of a fog when throughout this proceeding I have heard the words "cash position" just glibly used as if everybody understood it. Maybe it is my own lack of understanding that is at fault.

Now, can you tell me, in view of what I have said, as to what I am to understand concretely to be the real meaning of these words "cash position" as they appear in, well, let's say, your testimony, if that is different than what it is anywhere else.

The Witness: The only part of my testimony, Your Honor, that I remember particularly referring to cash position was in the comment with respect to the Maine Company, in which case I took the cash showing on the balance sheet of the end of the year, and the accounts—rather, notes receivable also appearing in the balance sheet of the end of the year, which were chiefly notes receivable from Mr. F. H. Prince & Company.

The Member: Did it make any difference to you whether this so-called cash position represented currency in physical possession or represented credits in the accounts with some banks and not others? Do you think that any of that mattered?

The Witness: Yes, sir; I think there is no question if you had cash in a bank that you were dubious about the solvency of, that the position would be different than if it were in a safe deposit vault or in a bank of unquestioned solvency.

The Member: What has been the question upon which your reasoning has proceeded as to what "cash position" meant? Have you always assumed that it was just the same as if it were in a safe deposit box?

The Witness: No, sir. I have been aware of the fact that the companies involved here at the end of certain of these years, not in 1933, but the end of 1932, had deposits which were—had certain deposits in banks which were not in a strong position.

The Member: So you have shaded the cash position into some imponderable extent by reason of the frailty of any one's deposit position at that time; have you?

The Witness: Well, I have not applied any discount factor against the cash of any given year to assume that there would be a tying up or a loss of a given amount of cash in that year, because the position of the company in all years seemed to me adequately strong to take care of any difficulties that arose from the known weakness of the one bank in which this company was particularly interested.

The Member: What bank was that?

The Witness: That was the Stock Yards National Bank, which was reorganized early in 1933.

The Member: Well, now, is that because you thought that the possible uncertainties of the cash position were not substantial, not serious, and that they could be treated as a negligible factor?

The Witness: I certainly wouldn't treat it as a negligible factor, Your Honor. I thought that the company's position as to assets and earnings in the face of the possible difficulties with respect to the cash that was held in this one bank was adequately strong to enable it to take care of difficulties. After all, one of the basic purposes of a surplus is to take care of rainy days, and, certainly, they come at times.

The Member: Well, that means that the elasticity in other factors was sufficiently great to overcome the elasticity in the cash factor; is that right?

The Witness: That is my opinion; yes, sir.

The Member: Well, that is all I want to get, what your—

The Witness: Yes, sir.

The Member: —mode of thought is about this.

The Witness: Yes, sir.

The Member: We will suspend now until 10 o'clock tomorrow morning, and, as I understand it, the cross-examination may then proceed?

Mr. Clark: Yes, sir.

The Member: You are through, Mr. Clark, are you not?

(Whereupon, at 4:40 o'clock p. m., February 6, 1939, the hearing in the above-entitled matter was adjourned.)

[Title omitted.]

SEVENTH DAY.

REPORTER'S MINUTES.

[Filed February 8, 1939.]

Hearing at Washington, D. C., on the 7th day of February, 1939, at 10 o'clock a.m.

The hearing in the above-entitled proceeding was resumed on this the 7th day of February, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted.)

PROCEEDINGS.

The Member: You may proceed.

Mr. Clark: I am advised relative to Exhibits NNNN and OOOO, the first being the income tax return of the Chicago River and Indiana Railroad Company, and, second, the comparative balance sheets of the same for December 31, 1933, that a check of them has been accomplished, and they may now be admitted in evidence, in accordance with Your Honor's orders yesterday.

The Member: There is no objection, Mr. Welch?

Mr. Welch: There is none.

The Member: Very well. Let them be marked in evidence.

(The documents so offered and received in evidence, were marked "Respondent's Exhibits NNNN and OOOO," and made a part of this record.)

Mr. Clark: Will you take the stand, Mr. Merriman.

MR. NORMAN MERRIMAN

having heretofore been first duly sworn, was recalled to the stand, and was examined and testified as follows:

X-Q. 123. (By Mr. Clark). Mr. Merriman, at the beginning of your testimony yesterday you said that you lived in New Jersey. *A.* Yes, sir.

X-Q. 124. And in your quafifications you said something about doing something for a large group of important railroad companies in New Jersey. Do you remember? *A.* Yes, sir.

X-Q. 125. And I take it what you were doing for them has some connection with the tax situation in the State of New Jersey; is that right? *A.* That is correct, sir.

X-Q. 126. That is to say, they are now being taxed or threatened with a tax, with a personal property tax in New Jersey? *A.* No, sir. This—

X-Q. 127. Well, if the answer is "no," that is good enough. You know, do you not, that as a student of corporate matters, and as a resident of New Jersey, that New Jersey cities and towns are now asserting taxes against corporations having a domiciliary situs in those towns and cities? *A.* Yes, sir; that is correct.

X-Q. 128. And the City of Jersey City would be a sample, would it not? *A.* Yes, sir.

X-Q. 129. I would like to show you, Mr. Merriman, the original of an assessment against the New Jersey Company, and ask you to glance at it. Have you seen similar assessments on other companies? No doubt you have, in your position. *A.* I don't remember ever having seen the original assessment.

X-Q. 130. But you know this is going on, do you not? *A.* I know this type of assessment has been going on.

X-Q. 131. I call your attention to the paper which you

have before you, which is headed "The Chicago Junction Railways and Union Stock Yards Company, 15 Channing Place, Jersey City, N. J." That is the company that we have called the Jersey Company here. *A.* Yes, sir.

X-Q. 132. This begins, "You are hereby notified that the City of Jersey City has made written complaint to the Hudson County Board of Taxation that assessments of $31,988,802 for the year 1937, and $33,183,003 for the year 1938 be entered to the tax lists and duplicate of taxes in the District of the City of Jersey City, Hudson County, New Jersey, for the years 1937 and 1938, respectively, on the intangible personal property owned by the Chicago Junction Railways and Union Stock Yards Company." Do you observe that assessment of 33 millions in one year and 31 millions in another? *A.* Yes, sir.

X-Q. 133. Could you help us by telling us the approximate rate of taxation imposed by the City of Jersey City on these assessments? *A.* On the intangible personal property?

X-Q. 134. Yes. *A.* No, sir.

X-Q. 135. If I stated to you that it is $45 per thousand, would that seem unreasonable to you? *A.* On intangible personal property?

X-Q. 136. Yes. *A.* It would seem extraordinarily high to me, but I cannot—I have no knowledge on that point.

X-Q. 137. In any event, from your knowledge of the Jersey Company of the State of New Jersey, and of Jersey City, you will be quick to tell us that a company with a domiciliary situs in Jersey City is now facing personal property taxes, won't you? *A.* Substantial.

X-Q. 138. Substantial? *A.* Taxes; yes, sir.

X-Q. 139. And it follows, doesn't it, Mr. Merriman, that you get a further and quite cogent reason as to why it would be desirable to liquidate the Jersey Company in 1940? *A.*

Yes, sir; I believe it would be desirable to liquidate it in 1940.

X-Q. 140. Thanks for that. Now, early in your testimony you talked about canvassing the bond market for bid prices and asked prices on Jersey securities; do you remember? A. Yes, sir.

X-Q. 141. May I ask you whether or not in your study you came across the name of F. H. Prince & Company at any time? Just "yes" or "no." A. I did not; no, sir.

X-Q. 142. Did you learn that F. H. Prince & Company had steadily made bids for some of these securities about which you testified? A. Not through that study. That is in the record.

X-Q. 143. Did you learn it through some other source? A. Only through the record.

Mr. Welch: Without waiving my objection, if Your Honor please, to the admissibility of the opinion evidence as to whether or not the Maine Company is a holding company, which, I take it, I wouldn't in any event, but I want to be cautious—without waiving that objection, I wish to question the witness somewhat on that line of testimony.

X-Q. 144. (By Mr. Welch): Have you a copy of yesterday's record before you? A. No, sir; I have not seen yesterday's record at all.

Mr. Welch: I think it would be a convenience to the witness, and perhaps to me as well, if someone of my friends, if not my enemies, supplied him with a copy of the record to which I shall refer from time to time. Mr. Green, is there a second copy of our transcript in the room? And you have only one, Mr. Clark?

Mr. Clark: That is all, yes.

Mr. Welch: It follows—

The Member: Has the Clerk one?

The Clerk: No.

The Member: There should be one somewhere in the Board; that is, the original undoubtedly has been delivered to the proper officer of the Board, and, perhaps, if you are not going to need the Clerk for a minute, I will send him out to ask for it.

Mr. Welch: I think we will do much better if we have one.

The Member: You go after that, Mr. Ray.

X-Q. 145. (By Mr. Welch). Oh, Mr. Merriman, let me ask you this, too: Have you got before you all the papers you used in testifying yesterday? A. I just sent for some of them. I have certain of them. I thought I had them all and just discovered I didn't have them.

X-Q. 146. I shall want you to have them all, but I understand you sent for them? A. Yes, sir.

Mr. Welch: Now, if Your Honor please, I think I can go ahead on this point readily.

X-Q. 147. (By Mr. Welch). I call your attention, Mr. Merriman, to page 774 of yesterday's record, where you were testifying that in your opinion the Maine Company is a holding company, and I would like to ask you if you testified as follows:

"It is inconceivable to me that Mr. Prince, as president of the Maine Company, would give himself orders as president of the Jersey Company to transmit orders to the Union Stock Yards and Transit Company of which he was chairman of the board." A. Yes, sir.

X-Q. 148. You so testified? A. Yes.

X-Q. 149. And, I take it, you chose the word "inconceivable" with care; did you not? A. I believe so.

X-Q. 150. And this morning, as well as yesterday, it seems just inconceivable to you that the president of the Maine Company could order himself, let's say, as chairman

of the board of the Transit Company, to do something, and then do it; doesn't it? A. In the carrying out of ordinary—

X-Q. 151. Just "yes" or "no." It just seems inconceivable, does it not? A. It is certainly difficult to conceive.

X-Q. 152. Well, let me test you, if I may.

Let us suppose that Mr. Prince, as president of the Maine Company, writes a letter to the Transit Company and says: "Transit Company: Dear Sirs: I want you to move your bank account from the Stock Yards National Bank to the Drovers National Bank."

You can conceive him writing such a letter, can't you? A. Yes, sir.

X-Q. 153. And you can conceive of him sending it to Chicago, can't you? A. Yes.

X-Q. 154. Now, let us assume that a week later Mr. Prince went out to Chicago. That is easy, isn't it? A. Yes, sir.

X-Q. 155. And suppose he says to Mr. Leonard on arrival, "Have you changed that bank account?"

And Mr. Leonard said, "No. Sorry, Mr. Prince. We have all been sick out here, and we have not done it."

That is easy to conceive, isn't it? A. Yes, sir.

X-Q. 156. Now, suppose Mr. Prince then says, "Well, bring me the check book. I think I will do this myself," and he made out a check for the bank balance in the Stock Yards National paid over to the Drovers National.

That is conceivable, isn't it? A. Yes, sir.

X-Q. 157. Suppose he then walked over and made the new deposit. That is conceivable? A. Yes, sir.

X-Q. 158. Now, let me take you back to where Mr. Prince wrote the letter for the Maine Company. For whom would he be acting when he wrote the letter? A. If he wrote such a letter and signed it as president of the Maine Company, I presume he would be acting for the Maine Company.

X-Q. 159. Could you go with me far enough, omit the word "presume" and say he would be acting for the Maine Company? A. I think the line of distinction is very difficult to draw, the chairman of the board of the Chicago Stock Yards and Transit Company acting in the interest of the Stock Yards and Transit Company.

X-Q. 160. Yes. But suppose when he reaches into his desk and takes out a letterhead of the Maine Company and writes an order on it, have you any doubt that he is acting for the Maine Company when he writes that letter on that letterhead and signs it? A. Yes, sir; I would be inclined to doubt it.

X-Q. 161. You would doubt whether he was really acting for the Maine Company? A. He would have the letterheads in his desk, and he may write on that letterhead as a matter of convenience.

X-Q. 162. All right. Now, suppose he wrote this letter, suppose he took the letterhead of the Maine Company and said: "Dear Mr. Leonard: I have just been looking over the Maine Company situation, and we are short of money here. I want you promptly to declare a dividend." Would you say he was acting for the Maine Company when he wrote that letter, aimed to increase the bank balance of the Maine Company? A. Yes, sir. I would say he was acting for the Maine Company.

X-Q. 163. All right.

Now, let us suppose, on this line, that again he goes to Chicago in a week or two—would you do that for me? A. Yes, sir.

X-Q. 164. And when he gets out there he says, "Boys, did you declare that dividend that I, as president of the Maine Company, asked you for?"

And they said "No, Mr. Prince. We have all been sick, and we have not done it."

Can you assume that? A. Yes, sir.

X-Q. 165. Then, suppose Mr. Prince, as chairman of the board of the Transit Company, says, "I want a meeting right away. Bring me a notice, or a waiver of notice, of a directors' meeting. I am going to sign it and call a meeting."

Will you assume that with me? A. Yes, sir.

X-Q. 166. Now, when he gives that notice out, or that waiver, and signs it, would you say he was acting for the Transit Company? A. Necessarily, as chairman of the board of—as director of the Transit Company he would be acting for the Transit Company.

X-Q. 167. Yes. Then they go ahead and declare the dividend. You will assume that? A. Yes.

X-Q. 168. Now, haven't you got a situation there where the Maine Company had ordered the Transit Company to do something? A. Yes, sir.

X-Q. 169. Mr. Prince ordering them? A. Yes, sir.

X-Q. 170. Haven't you, two weeks later, when Mr. Prince is out there and signs the waiver and calls the meeting—haven't you got Mr. Prince, as chairman of the board of the Transit Company, carrying out an order from the Maine Company? A. Under those circumstances, I think that is correct.

X-Q. 171. Now, that being true, would you like to reconsider that strong word of yours, "it is inconceivable to me that Mr. Prince, as an officer of the Maine Company, could give himself an order as an officer of the Transit Company"? A. I would modify that to say it would be difficult to conceive all that being the usual business procedure.

X-Q. 172. But, Mr. Merriman, under a little guidance from me, it is quite easy this morning to conceive that, isn't it? A. It would be quite unusual circumstances.

X-Q. 173. Not extraordinarily so, changing one bank ac-

count from one bank to another, or demanding a dividend? Not extraordinary, is it? A. It is not extraordinary at all that the company should consider changing a bank account or declaring a dividend. That is the normal function of the chairman of the board, as chief executive officer of the Union Stock Yards and Transit Company.

X-Q. 174. I think perhaps I have dealt enough for the moment on that. Let us turn to another thing.

You, of course, have read Mr. Leonard's testimony? A. Yes, sir.

X-Q. 175. Did you read that portion of it where he told how he wanted $2,000,000 worth of new concrete hog houses and asked Mr. Prince for them? A. Yes, sir.

X-Q. 176. Now, if you remember, Mr. Prince said "no"; don't you? A. Yes, sir.

X-Q. 177. Now, he had asked Mr. Prince for money from the Maine Company; do you remember? A. Yes, sir.

X-Q. 178. And it was in 1933? A. I don't remember the date.

X-Q. 179. Now, I would like you just to glance at the balance sheet of the Transit Company for 1933—oh, you have a copy of the stipulation. Look at it. A. Balance sheet of the Transit Company?

X-Q. 180. S-4, page 6.

Are you looking at it, Mr. Merriman? A. Yes, sir.

X-Q. 181. Now, it is clear from that balance sheet, S-4, page 6, that in 1933 the Transit Company was in no position to spend $2,000,000 for hog houses, was it? A. It did not have those free cash resources; no, sir.

X-Q. 182. So when Mr. Leonard asks Mr. Prince for $2,000,000 to build hog houses he is clearly asking him that as president of the Maine Company? A. Yes, sir.

X-Q. 183. Because the Maine Company in that very year

has plenty to build hog houses, if it has not a more cogent need for it. A. Yes, sir.

X-Q. 184. Now, is it inconceivable to you that when Mr. Prince says "no" to the hog houses, he is saying "no" to the Transit Company, of which he is chairman? A. Yes, sir.

X-Q. 185. That is inconceivable to you? A. No. I say it is conceivable to me.

X-Q. 186. It is quite conceivable. A. Yes, sir.

X-Q. 187. Now, let us take up the bank crisis in 1932 and 1933. You have studied that, no doubt, haven't you? A. Yes.

X-Q. 188. Could I ask you, Mr. Merriman, if that bank crisis looms with you as a somewhat important event in this whole case? A. Yes, sir; I think the banking situation between 1931 and 1933 is a very important matter.

X-Q. 189. Now, you remember the testimony is that Mr. Prince and Mr. McDonough, of the Maine Company, were very active in that whole matter? A. Yes, sir.

X-Q. 190. And that the Maine Company told the Transit Company how much to put up? A. (No answer.)

X-Q. 191. Oh, you must know that, if you studied it. A. I remember that the—I remember the amounts that were put up respectively by the various companies.

X-Q. 192. And don't you remember the testimony that it was the Maine Company that decided what the amounts were? A. Yes, sir.

X-Q. 193. Yes. The Maine Company told the Transit Company what to do, didn't it? A. Yes, sir.

X-Q. 194. And it told the Produce Terminal what to do? A. Yes, sir.

X-Q. 195. And Central Manufacturing District, didn't it? A. As well as I remember the testimony; yes, sir.

X-Q. 196. Now, there is no doubt in your mind, is there,

that when Mr. Prince told those companies what to do he was acting on behalf of the Maine Company, is there? A. I still find it difficult to disassociate the personality of Mr. Prince as the chairman of the Transit Company and president of the Maine Company.

X-Q. 197. And it is because you have that difficulty that I am pursuing this line, hoping that I can in some way clear that difficulty with you, because I think you have created a difficulty that you need not have created, Mr. Merriman.

Now, let us consider once more: There isn't any difficulty about the proposition that when the Maine Company tells the operating companies how much to put up and how it is to be subordinated, on what level, there is no difficulty about the fact that Mr. Prince is acting for the Maine Company when he makes those decisions, is there? A. No, sir.

X-Q. 198. All right. Thank you. After Mr. Prince and Mr. McDonough made the decisions on the part of the Maine Company as to what the operating companies were to do, you remember that subordination agreements were signed: don't you? A. Yes, sir.

X-Q. 199. Now, let's assume—I think it is a fact—but let's assume that those subordination agreements were signed by Mr. Prince. They could have been, readily, couldn't they? A. Yes, sir.

X-Q. 200. When he sat down with a pen to sign a subordination agreement, which subordinated the deposits, let's say, of the Transit Company, and he held the pen in his hand, have you any doubt that he signed it acting for the Transit Company? A. No, sir.

X-Q. 201. None whatever? A. (Witness shakes head negatively.)

X-Q. 202. Just one other test, if I may:

You remember the New York Central lease, Mr. Merriman? A. Yes, sir.

X-Q. 203. That was negotiated entirely by Mr. Prince, so the testimony shows. Have you read that? A. I have read that testimony.

X-Q. 204. Yes. A. I—

X-Q. 205. And the lease— A. I don't remember that particular point.

X-Q. 206. Well, assume, if you will, that that is the testimony. That lease was signed some time prior to 1922, was it not, or in '22? A. It was signed in May of 1922, I think.

X-Q. 207. O. K. A. The agreement—

X-Q. 208. That is about right. A. —carried back earlier subject to approval of the Interstate Commerce Commission.

X-Q. 209. Have you any doubt that when Mr. Prince was negotiating that lease, he was acting on behalf of the Maine Company? A. I think when he signed the lease, he must have acted in his corporate capacity as chief executive officer of the Railway Company.

X-Q. 210. But, Mr. Merriman, he was no officer of the Railway Company in that year. Do you know that, sir? A. I do not know that, and I do not remember who signed the lease.

X-Q. 211. Neither do I, but I do remember that Mr. Prince didn't go on the Railway board until 1926. Didn't you notice that as you went through the testimony? A. No, sir; I did not.

X-Q. 212. Assuming that Mr. Prince did not go on the Railway board until 1926, then there can be no doubt that in negotiating that lease he acted for the Maine Company, can there? A. In negotiating the lease he would undoubtedly act for the Maine Company.

X-Q. 213. I assume that in preparing yourself to testify that the Maine Company is a holding company you sought

every possible avenue of information, didn't you? A. I certainly endeavored to find everything that I could that had a bearing on the subject.

X-Q. 214. In your search did you come across the book that I hold before you headed "Before the Secretary of Agriculture, Bureau of Animal Industry, Docket No. 472, Secretary of Agriculture v. Union Stock Yards and Transit Company of Chicago"? A. What is the date of that?

Mr. Welch: Help, Mr. Green.

Mr. Green: I think I can find it for you. It is about July, 1938.

(There was a discussion off the record.)

A. Yes, sir; I have seen that report and read a copy. I obtained it from the files of the Department of Agriculture, which was not a printed copy; it was a typewritten copy.

X-Q. 215. (By Mr. Welch). And you considered that report among other things in forming your opinion that the Maine Company is a holding company.

(Pause.)

X-Q. 216. Why do you hesitate? You didn't read it for fun, did you? A. I read it for the purpose of finding out the nature of the operations and the income of the Union Stock Yards and Transit Company.

X-Q. 217. Precisely. A. And the value of its properties as ascertained by the Examiner in this case. I do not know that I read it from the standpoint of the inquiry as to whether this was a holding company or not.

X-Q. 218. But you read it? A. Certainly.

X-Q. 219. You told us. A. I read it. I read it to obtain whatever information there was that had—bore light on this subject.

X-Q. 220. And you read it, of course, with a view to preparing yourself to testify here? A. Yes, sir.

X-Q. 221. Now, let's read together something in it that I

find of interest, and I am reading from page 24 of Docket No. 472 before the Secretary of Agriculture, paragraph numbered 44.

"The financial history of the Respondent as it relates first to the New Jersey Company and later to the Maine Company leads to the conclusion that the Respondent in this proceeding is in effect owned, operated, and managed by the Maine Company."

Now, you read that, didn't you? A. Yes, sir.

X-Q. 222. And you knew that was a finding in the hearing before the Secretary of Agriculture? A. Yes, sir.

X-Q. 223. And you, of course, knew that the word "Respondent" referred to the Union Stock Yards and Transit Company. A. Yes, sir.

X-Q. 224. Did you consider that finding carefully when you formed your opinion that the Maine Company was a holding company wholly?

Mr. Clark: If Your Honor please—

The Member: Have you finished?

Mr. Welch: Yes.

Mr. Clark: This seems to me wholly immaterial. This is a proceeding before the Department of Agriculture. It has no bearing on this case. There is no evidence as to the facts that were presented there, and it doesn't seem to me that it is proper cross-examination, although I don't like to interfere with cross-examination.

The Member: That is an objection, I take it?

Mr. Clark: Yes, sir.

The Member: It is overruled.

Mr. Welch: Will you read the question?

(Question read.)

A. The answer is "Yes."

X-Q. 225. (By Mr. Welch). The answer is "Yes."

Did you form the opinion that the Maine Company is a

holding company and nothing else before you read this sentence on page 24 of this report, or afterward? A. I have not testified that the Maine Company was a holding company and nothing else.

X-Q. 226. Ah! A. As I remember, my testimony of yesterday—

X-Q. 227. Then I think we will have no quarrel, sir. You think that the Maine Company is something other than just a holding company, don't you? A. I stated in my testimony yesterday, and endeavored to be clear about it, that the Maine Company undertook certain financial operations for the benefit of its subsidiary and affiliated companies, since it had become the repository of nearly all of the surplus cash of those companies.

X-Q. 228. Well, I would like it just concisely because some day I might want to point it, and will you give it to me concisely in "yes" or "no"?

After your study, you have formed the opinion that the Maine Company is something in addition to being just a holding company? "Yes" or "no." A. No.

X-Q. 229. Now, have you gone back on me? Are you going to tell me— A. No, sir.

X-Q. 230. Are you going to tell me now that it is a holding company and nothing else? A. Would you define a holding company for me, please?

X-Q. 231. Well, you see, you were—would you like for me to give you my conception of a holding company? A. Yes, sir.

X-Q. 232. If I form a corporation today and put into it, let us say, a thousand shares of United States Steel with which company I have nothing whatever to do except to hope I will get dividends and collect them, if I do, I should say that that was a holding company and nothing else.

Would you agree with me? A. Yes, sir.

X-Q. 233. And have I given a fair definition of a holding company? A. Of a company that is solely and entirely a holding company and exercises no functions of any character with respect to an enterprise.

X-Q. 234. Yes. So you will now say to me, will you not, that the Maine Company is not solely and entirely a holding company? A. Yes, sir; I insist that it is solely and entirely a holding company.

X-Q. 235. Solely and entirely? A. I do not know that it conducts any business operations except in connection with its holdings, and my opinion is that that is something that is within the function of a holding company.

X-Q. 236. Well, haven't you read all of the testimony about how the hand of the Maine Company rests on these operating companies steadily day by day? A. Yes, sir.

X-Q. 237. How they are on the telephone sometimes two or three times a day? You have read that, haven't you? A. Yes, sir.

X-Q. 238. How reports of what they are going to do—strike that out.

How reports of what they have done must be sent in regularly to the Maine Company? A. Yes, sir.

X-Q. 239. How the Maine Company vetoes some things that the operating company wants to do? A. Yes, sir.

X-Q. 240. And how the Maine Company gives the green light saying "Go ahead" on other things that the operating company wants to do? A. Yes, sir.

X-Q. 241. How the Maine Company selects the bank depositories for the operating companies? A. Yes, sir.

X-Q. 242. How the Maine Company dictates their boards of directors? A. Yes, sir.

X-Q. 243. How the Maine Company tells them when to declare dividends? Have you noticed that? A. I do not remember that in the testimony.

X-Q. 244. How the Maine Company picks key men for the operating companies? A. I don't remember that in the testimony. It may be.

X-Q. 245. Assume that it is in the testimony, will you? A. Yes.

X-Q. 246. When I call all of those things to your mind, you still prefer to say to His Honor that the Maine Company is solely a holding company? A. Yes, sir.

X-Q. 247. You do? A. Yes, sir.

X-Q. 248. Now, have your papers come down? A. Yes, sir.

X-Q. 249. That you sent for?

Has anybody found a copy of the record yet?

Mr. Pierson: He has one.

The Member: You have the copy of the record before you?

The Witness: Yes, sir.

The Member: For yesterday's proceedings?

X-Q. 250. (By Mr. Welch). Would you turn to page 779 of the record with me, Mr. Merriman? A. Yes, sir.

The Member: If you have another copy, let the Clerk get the copy from the witness, and then let the witness borrow another copy from somewhere else, will you please?

X-Q. 251. Will you turn to page 779, please, Mr. Merriman? A. Yes, sir.

X-Q. 252. At the top of that page, your answer begins: "Yes, sir," I think I had better pick up a word or two on page 778.

"The record of income of the Maine Company shows that continuously for a considerable number of years it accumulated surplus," and then I go ahead at the top: "accumulated a large surplus which was used as a possible financial reservoir for the emergency needs of the subsidiary and affiliated companies on certain occasions in between '30 and

'33, but which was used regularly as a source of financing the chief stockholder of the company."

You observe those words? A. Yes, sir.

X-Q. 253. "Was used regularly as a source of financing the chief stockholder of the company."

Now, I would like it if you would show me your notes from which you testified when you told us that; would you, please, sir? A. I had no particular notes in front of me to make that testimony. I have the balance sheets, income accounts, the material in the stipulation with respect—and the material in the record with respect to the financing that was done by the Maine Company in connection with the bank difficulties in the latter years of this period, and the record of loans made to F. H. Prince or F. H. Prince & Company which appear in the exhibits attached to the stipulation.

X-Q. 254. You had also, no doubt, the evidence in respect to the loans that was introduced by the Petitioner? A. Yes, sir.

X-Q. 255. Would you be good enough to tell me, Mr. Merriman, the names of the witnesses whose evidence about these loans you considered significant? A. The most significant—

X-Q. 256. I didn't ask you for the most. Just the names of the witnesses whose evidence about these loans seemed to you significant. A. I would say the evidence of Mr. Donovan primarily. I am not certain whether Mr. McDonough testified about those loans, and the exhibit attached to the stipulation shows the schedule of those loans from year to year.

X-Q. 257. Any other witness? A. At the moment I don't remember any other.

X-Q. 258. Well, now, Mr. Merriman, I will tell you why I am questioning you about this. I was surprised at your us-

ing the words "which was used regularly as a source of financing the chief stockholder."

Will you center your attention for a moment on those words "used regularly as a source of financing the chief stockholder"? A. Yes, sir.

X-Q. 259. By the word "regularly," do you mean from year to year, Mr. Merriman? A. I think the record shows that it was done for nearly every year during the last seven or eight years, ending in 1933.

X-Q. 260. Have you finished that answer? A. I am trying to locate the exhibit attached to the stipulation, which shows the total amount of the loans from the Maine Corporation to F. H. Prince and F. H. Prince & Company.

X-Q. 261. I will locate that for you in a moment. A. And I have notes on the balance sheets as the amount—the notes receivable that were due from F. H. Prince and F. H. Prince & Company during '29 and '30, '31, and '32, and '33, and they show a reasonably consistent growth.

X-Q. 262. A reasonably consistent growth? Is that the stand you now take, Mr. Merriman? A. Yes, sir.

X-Q. 263. And by that you mean that as each year succeeded the prior one, the loans were larger? A. That was the trend of them.

X-Q. 264. That was the trend? A. Yes, sir.

X-Q. 265. Now, look at S-65 a moment, will you? Have you it before you? A. Yes, sir.

X-Q. 266. Does that show the loans? We have the right exhibit, haven't we? A. Yes, sir.

X-Q. 267. You just told us that they show a steadily increasing trend from year to year. Tell us, if you will, the trend from 1929 to the year 1930. A. There was a decrease in the cash from 1929 to 1930 amounting to approximately half a million dollars.

X-Q. 268. That is to say, that in the year 1930 Mr. Prince

and F. H. Prince & Company repaid to the Maine Company in excess of half a million dollars; did they not? A. Yes, sir; that is correct.

X-Q. 269. So it is entirely incorrect to say that these loans had a steady increase from year to year, isn't it? A. No, sir; it is not; from 1922 to 1933.

X-Q. 270. You have answered it. A. This schedule—

X-Q. 271. "No, it is not." A. ——shows—

X-Q. 272. Just a moment.

Mr. Welch: Your Honor please, the answer is "No, it is not." I think the occasion calls for no further explanation. He can be taken on redirect.

Mr. Clark: I think, Your Honor, he is entitled to complete the answer to the question.

The Member: I will let him complete his answer.

Mr. Welch: The only thing is—

The Member: Now, don't do it at length.

A. In 1922 to 1933, the only year in which there was a decrease in the amount of cash owed by F. H. Prince and F. H. Prince & Company to the Maine Company was the year 1930.

X-Q. 273. 1930? A. The loans increased from $42,000 in 1922, in round figures, to $4,848,000 in 1933.

X-Q. 274. Now, that we all know.

Now, 1930 happens to be the first year that we have in issue, isn't it? A. Yes, sir.

X-Q. 275. So we start our lawsuit here with a year in which those loans decreased by more than half a million dollars; do we not? A. Yes, sir.

X-Q. 276. And that, by the way, is the first year when our now famous depression was beginning to be felt, wasn't it? A. Yes, sir.

X-Q. 277. Now, I want to call your attention to another part of that answer—of that sentence "which was used regu-

larly." I dealt with that for the moment. "As a source of financing the chief stockholder of the company."

Now, have you learned from the testimony what was actually done with the money that was borrowed from the Maine Company by F. H. Prince or F. H. Prince & Company?" A. I have read the record in that respect.

X-Q. 278. Let me call your attention, if I may, to the purchase of Armour stock in 1933. You are familiar with that? A. Yes, sir.

X-Q. 279. Did you study Mr. Leonard's testimony in which he said in substance that that purchase had been a great help to the Maine Company? A. Yes, sir.

X-Q. 280. One million dollars was loaned by the Maine Company to F. H. Prince & Company to effect that purchase, wasn't it? I mean, that is the testimony? A. That is my recollection of the tenor of the testimony.

X-Q. 281. Now, I think you testified—I am going to another point in your testimony—will you look at page 791? A. Yes, sir.

X-Q. 282. Look at the last three lines on the page, which I will read to you: "And I think that dividends to its stockholders would be a more logical policy than loans to stockholders that bore substantially less interest than could be obtained by the retirement of the company's own securities." A. Yes, sir.

X-Q. 283. Now, let's take this Armour purchase, and the testimony as it stands. Is it your opinion that the Maine Company would have been better served by a declaration of an additional dividend of a million dollars to Mr. Prince in the year '33 than it was served by a loan to F. H. Prince & Company used to buy Armour Company stock? A. I do not think it possible to answer that hypothetical question. It has not sufficient number of elements in it.

X-Q. 284. Well, let us see if it does not.

Mr. Welch: Could I have it read?

(Last question read.)

Mr. Welch: Now, the witness' position is, Your Honor, that he should not be required to answer.

The Member: Well, what is the question that the witness is being asked now?

Mr. Welch: I just had it read.

The Member: You will have to tell me exactly what the situation is. Has the witness refused to answer?

The Witness: I said I thought the question did not have enough elements in it to enable me to give an answer. It was a hypothetical question without sufficient elements in it to enable me to answer.

X-Q. 285. (By Mr. Welch). You see, one advantage the cross-examiner has is that he can put in hypothetical questions just what he likes and have you tell him what your opinion is, and I want to test you by that question with just what it has in it.

Mr. Clark: The witness says he cannot answer.

The Member: You say you cannot answer that question; is that correct?

The Witness: I say it does not have sufficient elements in it. It is a hypothetical question without sufficient elements in it to enable me to answer, to base an opinion on it.

The Member: I think you will have to carry him along and ask him questions.

X-Q. 286. (By Mr. Welch). Let us assume, Mr. Merriman, that in the year 1933 Mr. Prince, as director of the Maine Company, thought it would be to the advantage of the Maine Company if he owned a million dollar block of stock in Armour & Company. Will you assume that? *A.* Yes, sir.

X-Q. 287. Let us assume that he in that year acquired the million dollar block. Will you assume that? *A.* Yes, sir.

X-Q. 288. Let us assume that as a consequence Mr. Prince went on the board of Armour & Company. *A.* Yes, sir.

X-Q. 289. And let us assume that Mr. Leonard has testified that the income of the Transit Company, and hence the Maine Company, has been increased by about a quarter of a million dollars per year as a consequence of that purchase of Armour stock. Will you assume that? *A.* You are asking me to assume that?

X-Q. 290. Yes. *A.* That is not in the record. It is a condition contrary to fact. Mr. Leonard did not testify to that.

X-Q. 291. Let us assume, then, that in substance Mr. Leonard testified that the purchase of the Armour stock had had a beneficial interest on the Transit Company, and therefore on the Maine Company. Will you make that assumption? *A.* Yes, sir.

X-Q. 292. Let us assume that to make the purchase possible the Maine Company lent $1,000,000 to F. H. Prince & Company. Will you assume that? *A.* Yes; sir.

X-Q. 293. Now, here is my question:

On all of these assumptions that I have put to you, is it your opinion that the Maine Company would have been better served in 1933 had it declared any dividends to Mr. Prince in the sum of $1,000,000 than it was served by making the loan to purchase Armour stock? *A.* On the assumption that the Maine Company would make the loan to Mr. Prince for the purpose of buying that stock and using it in the fashion in which he did, that they would set it up as a requirement for the loan, I think it would be better than declaring a dividend, which he would be free to use in any fashion.

X-Q. 294. And using that, then, simply as a typical transaction, in so far as the loans to F. H. Prince or F. H. Prince & Company were made to serve some interest of the Maine Company, is it your opinion that the Maine Company is bet-

ter off on making the loans than it would be on declaring a dividend? A. Yes, sir; on that assumption.

X-Q. 295. That is all I want.

Mr. Clark: Did the Reporter get the "yes, sir on that assumption"?

The Reporter: Yes.

The Member: He has got it. It is all clear.

X-Q. 296. (By Mr. Welch). Incidentally, while we are dealing with these loans, I want to ask you whether or not in your opinion the common stock of the Maine Company is clearly worth its book value. A. I have made no analysis of the common stock of the Maine Company to determine the asset value of that stock. It is my opinion, from the studies that I have made, that it is probably worth substantially in excess of its book value.

X-Q. 297. You would have no difficulty in saying that it is worth at least its book value, would you? A. No, sir; I would not.

X-Q. 298. Oh, by the way, did you hear or read Mr. Prince's testimony to the effect that he did borrow $160,000 as a temporary loan for personal use to buy his present home until such time as he could sell Princemere, his old home? Did you read that testimony? A. Yes, sir.

The Member: Mr. Welch, I want to go back to that book value. I do not understand that question. Common stock on the books of the corporation issuing it does not have book value at all. Here you are talking about book value—

Mr. Welch: Well—

The Member: I only wanted to be clear. I can surmise the meaning, but I want the record to be clear on what you mean.

Mr. Welch: In using the words "book value" of the Maine Company, I did not mean the value at which that stock was taken on its books; I meant the value of the stock when you

consider its assets and its liabilities as shown on its balance sheets and such apparent value per share of the stock of the Maine Company.

The Member: You see, the net worth is on the liability side as capital stock.

Mr. Welch: Yes.

The Member: Is that what the book value is?

Mr. Welch: Yes.

The Member: That is the way you understood it, and that is the way you used it, Mr. Merriman?

The Witness: That is the way I used it.

The Member: All right.

Mr. Welch: Would you read that last question to me?

Oh, I remember what it was. I will strike out the last question.

X-Q. 299. (By Mr. Welch). You heard Mr. Prince's testimony, Mr. Merriman, that he did on one occasion borrow for his own personal use, and that was the occasion that he borrowed $160,000 from the Maine Company to buy a house in Newport, the loan being temporary in character, until such time as he could sell Princemere, his old home? Did you read that testimony? A. I read that testimony.

X-Q. 300. Now, you would say, would you not, Mr. Merriman, from your study of the large figures involved in this case, that a sum of as little as $160,000 is scarcely significant enough to determine the destiny of this case?

Mr. Clark: Let me hear the question, please Mr. Reporter.

(Last question read.)

Mr. Clark: Oh, I object to it.

Mr. Welch: Strike it out.

X-Q. 301. (By Mr. Welch). From your study of the figures involved in this case, at no place in it does the sum of $160,000 ever become very significant, does it? A. Not to me, sir.

X-Q. 302. Now, I want to turn, if I may, to this—there is an Exhibit RRRR, which is the chart, the small copy—

The Member: That is the one Mr. Clark has been using.

Mr. Clark: Has that duplication been made?

The Witness: Mr. King has one copy.

Mr. King: That is news to me. When did I get it?

Mr. Clark: Do you have a copy before you?

The Witness: No, sir.

Mr. Clark: Has the exhibit been returned to the Board?

The Member: Mr. Welch has the original exhibit before him now.

Mr. Clark: Has a copy been delivered to the Petitioner?

There is another copy, is there not, Mr. King?

It is to be photostated, Your Honor.

The Member: Well, photostating would not do with an exhibit like that. You have an exhibit with two colors on the original, and this witness has put another color on it. Of course, you cannot do that with a photostat.

Mr. Clark: Well, Mr. Merriman, won't you draft another one of those? I do not mean at the moment necessarily. There is another copy here which—

Mr. Welch: Is that a duplicate?

Mr. Clark: Yes, it is.

I think Mr. Merriman can use this.

Mr. Welch: Yes, let him have that, and I will hold the one I have.

Is it possible for Your Honor to see this?

The Member: I can see perfectly well.

X-Q. 303. (By Mr. Welch). Now, let me see, Mr. Merriman, if I can determine what you have done. You have, I believe made some dots on this chart from year to year, which dots you placed by reference to S-51; is that right?

A. Yes, sir; that is correct.

X-Q. 304. And you have taken the column "Net Income" S-51 and made a dot each to represent it, or to fix it on the columns, and then have drawn a connecting line between all those dots; have you not? A. Yes, sir.

X-Q. 305. And you have used a scale ten times that of the scale on which the chart was originally constructed? A. Yes, sir.

X-Q. 306. Did it seem to you that it would be helpful to us all to have a chart with two different scales, Mr. Merriman? A. Yes, sir. It is a very common practice with this kind of chart.

X-Q. 307. A very common practice.

Now, the consequence of what you have done is that you have a rise of the net earnings after 1922, do you not? A. Yes, sir. After 1920 the rise becomes apparent.

X-Q. 308. Yes, but really it goes quite beautifully from 1922 on, does it? A. Yes, sir.

X-Q. 309. You know, do you not, the secret of that rise? A. Oh, yes.

X-Q. 310. And what was it? A. The most important factor in that rise was the lease from the River Road—the Railway Company's property by the Chicago River and Indiana.

X-Q. 311. Quite right.

Now, may I ask you whether or not on Exhibit 45 the results of that lease are in turn registered in the blue columns? A. Yes, sir.

X-Q. 312. So that the blue columns certainly show a delightful result from increased earnings, do they not? A. From the application of those increased earnings to additional cash resources and investments.

X-Q. 313. Right. And in so far as net income was swelled after 1922 by the new lease and less than that disbursed to stockholders in the form of dividends, just by that amount

does the blue column rise on that Exhibit S-45; does it not? A. Yes, sir.

X-Q. 314. Now, if I understand you correctly, you think Exhibit S-45 is correct mechanically, do you not? A. Yes, sir; I am quite sure of it.

X-Q. 315. Yes. And— A. Except for the fact that the red columns are stated to represent the resources to meet those requirements which I—

The Member: Just a minute. You mean the blue columns, don't you—

The Witness: Yes, sir.

The Member: —to represent the resources?

The Witness: I meant the blue columns are stated to represent the resources to meet those requirements, whereas they merely represent what might be termed the quick assets available to meet such requirements.

X-Q. 316. (By Mr. Welch). Yes. We fully understand each other, and I am sure His Honor understands us both.

You feel there is another chart which had fixed assets somewheres up along the blue column, do you not? A. Above the blue column.

X-Q. 317. Above the blue column. A. Yes.

X-Q. 318. Let us say a light blue representing fixed assets? A. Yes, sir.

X-Q. 319. Well, now, since you would be happier if fixed assets appeared on the chart, is that because this company ought to do some refunding in 1940 instead of paying its debts? A. I think refunding is logical for an enterprise of this character.

X-Q. 320. Now, let me put it to you the other way:

Let us take the years from 1930 to 1933, which we are considering, Mr. Merriman: It would not have been unreasonable for the Maine Company to plan to preserve this enterprise intact and to enjoy its earnings after 1940, would

it? A. I would expect that that would be reasonable, to preserve this enterprise.

X-Q. 321. You would think it was eminently reasonable for the directors of this company in 1930 to 1933 to plan to own the enterprise intact and enjoy its earnings after 1940, would you not? A. Certainly.

X-Q. 322. Now, that plan should involve in some way a discharge of the liens ahead of the Maine Company's ownership, or else substitute a new lease, should it not? A. One or the other.

X-Q. 323. Now, either plan could be adopted, couldn't it, the elimination of liens or the substitution of new ones in whole or in part? A. Yes, sir.

X-Q. 324. Now, if I understand you— A. There is a third plan that could be adopted, and that is to sell the Railway property, since that is a fixed income bearing investment.

X-Q. 325. Oh, but, Mr. Merriman, you just told us that any one in his right senses would want to preserve the enterprise intact after 1940. A. The major elements of the enterprise that contribute to increase the earnings, the possibility of increasing earnings, it is not possible for Chicago Stock Yards Company to increase the earnings from that lease, and that is a fixed investment, just as if they had a certain amount of money in very high grade bonds.

Mr. Welch: I certainly owe Your Honor an apology. I simply was not following.

May I have the answer read.

(Last answer read.)

X-Q. 326. (By Mr. Welch). Well, I thought you told us yesterday—I think you told us yesterday, on page 846 of your testimony, that—I will wait until you find it. A. Yes, sir. I have it.

X-Q. 327. In about the middle of your answer you said:

"Beginning about 1922 this enterprise became a strong enterprise. Prior to that time it had been a very thin margin operation."

Do you notice those words? A. Yes, sir.

X-Q. 328. Now, the secret of the change from a thin margin operation to a strong margin operation is the Railway lease, isn't it? A. Yes, sir.

X-Q. 329. Now, you do not want to tell His Honor that the Maine Company might dispose of the Railway lease and go back to the thin margin operation, do you? A. Oh, it would no longer be a thin margin operation if it disposed of the Railway lease. The Company clearly contemplated the probability of the disposal of the Chicago Junction Railway Company property, because there is an option in the lease, Petitioner's Exhibit No. 2, which provides for the sale of that property at 33 millions of dollars, and if they had 33 millions of dollars from the sale of that lease they could pay off all the amounts in the red columns and have a very substantial surplus left over.

X-Q. 330. Right. A. So that it would no longer be a thin margin operation.

X-Q. 331. Now, do you know anything about the attitude that the I. C. C. has taken about that 33 million dollar option? A. I have read all of the decisions of the I. C. C. in connection therewith.

X-Q. 332. Tell His Honor what stand the I. C. C. has taken with respect to the option. A. The I. C. C. has in its decision of 1928, in effect, as I interpret the decision, voided the option.

X-Q. 333. Right.

Now, as you went through your testimony yesterday, didn't you have the feeling that the Railway Company was, to use stock yards' terms, almost the prize bull of this show? A. From an investment standpoint, it is certainly the prize

bull. From the standpoint of increasing the income, it is not good at all. The income cannot, so far as I know, be increased in any way whatsoever under the terms of that lease; whereas, the income of the other elements of the property can, assuming good business conditions and good management, perhaps be worked up considerably over a period of years.

X-Q. 334. Now, in any event, you will agree with me that the managers of the Maine Company would be far from unreasonable in saying that they wanted to go on with their end of the Railway Company lease, would you? *A.* It would be a question of what they could get for it, whether they preferred to hold approximately 30 million dollars of value in the form of that particular security, or whether they preferred to diversify their investments.

X-Q. 335. Yes. I am only saying to you that if you heard the board of directors saying that they wanted to keep that lovely source of income, you would not quarrel with them as being silly or unreasonable, would you? *A.* There would be nothing unreasonable about it at all, or the determination to make the company an investment company which had a large share of its assets invested in a fixed interest-bearing security.

X-Q. 336. All right.

Now, let us assume, Mr. Merriman, that we are the board of directors of this company in 1930 and 1933, and we are looking forward to what we are going to do in 1940. You have already told me clearly that the Jersey Company ought to be liquidated.

A. I think it could be advantageous. I do not think it is essential at all.

X-Q. 337. But you think that good business judgment would be to liquidate it; do you not? *A.* Yes, sir.

X-Q. 338. And the consequence is that you and I both

agree that bonds have got to be paid off; that is 14 millions? A. Yes, sir.

X Q. 339. And, say, four or five millions of guaranteed bonds have got to be dealt with in some way. A. Yes, sir.

X Q. 340. And we know that this preferred stock has got to be paid, and that is about 6½ million dollars. A. Yes.

X Q. 341. And we know that the rest of the common stock that they have not yet succeeded in getting has got to be dealt with in some way. A. Yes, sir.

X Q. 342. Now, in any man's language, that is a large program, is it not? A. It is a substantial refinancing program; yes, sir.

X Q. 343. Now, as I understand you, if you sat in the seats of the directors in the years 1930 to 1933, you would have preferred to look forward to refinancing as against accumulating money to pay off the liens; is that right? A. I would

Mr. Welch: I believe that could be answered "yes" or "no." I would like it to be. I think it is fair.

Mr. Clark: Let the witness answer.

The Witness: May I have the question?

Mr. Welch: I see he is taking a deep breath.

Mr. Clark: Well, he certainly has the privilege of doing that.

Mr. Welch: Oh, yes.

May we have the question read?

The Member: Read the question.

(Last question read.)

A. Yes, sir; I believe I would.

X Q. 344. (By Mr. Welch). You would have preferred refinancing; that is right, isn't it? A. I believe so.

X Q. 345. Now, suppose I had sat on the board with you, Mr. Merriman, and I had said, "Mr. Merriman, I respect you but I would like to accumulate and pay them off." Would you have respected that position on my part? A. I would

have respected your position under any circumstances, but I would have criticized your failure to approve the purchasing of the company's obligations that were selling in the market from 20 to 25 percent discount.

X-Q. 346. Oh, that is another matter, and, between you and me, I think that criticism might have been pretty fair. *A.* Which would have reduced the obligations then and there.

X-Q. 347. Yes. *A.* Instead of waiting until 1940 to reduce them.

X-Q. 348. I think, Mr. Merriman, if I had said to you, "I am in favor of paying off the debts," I think you might have said to me, "Well, if so, why don't you go out and buy the bonds at a discount," and I think I might have said, "I think I will."

You follow me there, don't you? *A.* Yes, sir.

X-Q. 349. I am only asking you this: If I just sat at the table with you and heard you say you were in favor of refinancing, and I said, "No, by George, I would like to accumulate and pay them off," you wouldn't have considered my position utterly unreasonable, would you? *A.* I would have considered it somewhat unreasonable in view of the remarkable amount of cash or quick resources that were available to pay them off as of 1933.

X-Q. 350. All right.

Now, can I just have a little argument with you in the directors' room, when you say you think I am wrong and you are right? Suppose I said to you as we sat there, "But, Mr. Merriman, we are going through a panic here"? Would that have made you think my stand more reasonable? *A.* A panic?

X-Q. 351. Yes. *A.* A panic, Mr. Welch, is a great opportunity for this company. The loss of earnings that we get, and I am speaking now as a director—the loss of earnings

that comes to us as a result of this depression and panic is offset by the fact that we can buy our own securities at panic prices.

X-Q. 352. I see.

Well, look at the chart here, Exhibit 45, and watch the blue column toboggan from '31 to '33, and tell me if you think the panic helped this company.

A. That company used certain of its resources—all of these companies used certain of these resources to protect certain of their interests, or, at least, that is my interpretation of the testimony.

X-Q. 353. I would like you to answer my question. Just look at S-45 and tell me if you think that panic helped this taxpayer. *A.* I do not think the panic helped this taxpayer.

X-Q. 354. Right. *A.* No, sir.

X-Q. 355. Would you go so far—

The Member: I was about to suspend for a few minutes, but before I do so are you through, Mr. Welch, with the consideration to be given by the witness to this idea that he expressed about the refinancing of the lease, continuing with the lease, or its income?

Mr. Welch: Or disposing of it?

The Member: Or disposing of it?

Mr. Welch: I think I am.

The Member: May I ask a question, then, regarding it, interrupting your line of thought? And that has to do with whether in your statement that it was merely an alternative to the company as to whether it would continue or whether—that is, to continue to have this investment in fixed income or whether it would be wiser to dispose of it and shift its wealth into a more diversified income-producing investment—that is as I understood you.

The Witness: Yes, sir.

The Member: Now, I want to know, and you didn't say

anything about it, whether that alternative is affected by the factor of the depression in 1930, and, if so, how, and whether it would tilt the scales toward one or the other of the alternative available decisions.

Now, if you would rather wait until after the recess before you answer, why, we can recess now.

The Witness: I would rather check one or two figures.

The Member: All right. We will take a few minutes' recess, after which the witness can answer.

(There was a short recess taken.)

The Witness: I believe Your Honor's question was whether the depression of '30 to '33 had any important effect upon the value of railroad securities—

The Member: No, no. My question didn't have anything to do with the value of railroad securities.

My question was as to whether the fact of the depression as it existed in 1930 to 1933 would have, in your judgment, any influence in the determination of which of the two alternatives had better be adopted of the two alternatives that you suggested, keeping on with the fixed income security involved in that lease, or shifting that into a more greatly diversified investment, which is what I understood you to say were the alternatives.

The Witness: Yes, sir. I think it would have a bearing for the reason that investment opportunities were on the bargain counter, so to speak, in 1932 and '33, particularly, whereas the yield obtainable on railroad stocks similar to the Chicago Junction Railway Company was relatively low, and since the company had this great asset, it might well have considered reduction in the size of that asset, the amount of that stock that would be held, and that the sale of that either for the purpose of acquiring other investments that would be helpful in its enterprise, or the acquirement of other of its own securities at a large discount.

The Member: So that, concretely, you would say, if I understand your answer, that the factor of the depression would reasonably have led the corporation to make a change rather than to continue in the situation in which it was?

The Witness: Yes, sir.

The Member: Now, Mr. Welch.

X-Q. 356. (By Mr. Welch). Now, let's go back to that directors' meeting that you and I are both attending, when I am all for accumulating cash and paying off debts in 1940, and you are all for no accumulations and refinance. Do you remember? A. Yes.

X-Q. 357. Now, suppose that at that directors' meeting you brought this suggestion about selling this wonderful asset, the Railway Company, and suppose I had said to you, "Mr. Merriman, it doesn't look to me like a time to change. These are perilous times. I feel more comfortable just sitting on that lease."

You wouldn't have thought me unreasonable in saying that to you, would you? A. That again depends on your definition of "unreasonable."

X-Q. 358. Well, that is a tough thing, but just however you would use it. You wouldn't think I was just silly to talk that way, would you? A. I would think it was bad business policy to carry that many eggs in one basket.

X-Q. 359. Yes. That isn't my question.

Would you think I was unreasonable if I took the other view and said, "I feel much more comfortable with that fine old lease behind me"? A. I would think your knowledge of investment conditions existing at that time was not very good, Mr. Welch.

X-Q. 360. Yes, but once again that is not the question. Would you think that you had an ugly, unreasonable director sitting with you when I took that stand? A. I would think he was somewhat pig-headed; yes, sir.

X-Q. 361. Pig-headed. And are, in your vocabulary, pig-headed people unreasonable? A. In my vocabulary it means stubborn.

X-Q. 362. But now that isn't the question. I will assume that I will stay put, see. I will be stubborn about wanting the fine old lease. I only ask you if the decision on my part that I want to stay put and stand by it is an unreasonable decision. A. Yes, sir; I think it is.

X-Q. 363. Unreasonable.

Let's assume we are still in that same directors' meeting and I say this to you: Let's assume, Mr. Merriman, that we are in a directors' meeting in 1930, and I say to you, when we are having our discussion, "We have paid 5 percent on the common, the only stock, ever since 1924, when the New York Central lease came in. It is $400,000 a year. And all of the fellows at the club tell me there is a panic on. I don't think we ought to increase that dividend this year."

And I said that to you, what would you have said to me? A. You are asking for a specific statement with respect to one specific meeting.

X-Q. 364. Yes. This is our dividend meeting in 1930, and when I say that to you, would you say to me, "Oh, no, Welch, this is the time to increase it"? A. I would have said to you

X-Q. 365. Would you have said that? A. American corporations, leading industrial corporations throughout the United States were tending to increase the percentage they paid in dividends to enable their stockholders to combat the force of the depression, and for that reason a well-financed company "such as ours with virtually impregnable resources should increase its dividend, since it was paying such a tiny proportion of the earnings that the large well financed industrial companies of the United States which had less stable sources of income than we had were paying 60 to 65

percent of the earnings, and we were paying less in 1930—our dividend rate was less than 20 percent;" and I would have thought that our stockholders would be entitled to a greater distribution than they received.

X-Q. 366. "Our stockholders"? A. Our stockholder.

X-Q. 367. Our stockholder. But suppose I said to you right away, "Mr. Merriman, I don't care anything about what these other companies are doing with their big groups of stockholders. I am the only stockholder here. $400,000 a year is all I need by any stretch of the imagination."

"Don't you think, Mr. Merriman, we would do well to keep the company strong in times like this"?

Had I said that to you would that have sounded to you unreasonable on that part? A. I would have stated that I think—

X-Q. 368. The question is, would that have sounded unreasonable on my part? A. I would have said, "I consider it unreasonable"—

X-Q. 369. The question is—I beg your pardon.

The Member: Now, wait just a minute. He is about to answer your question.

A. "I would consider it unreasonable to continue to build up surplus."

X-Q. 370. All right. A. "In this fashion. We have already accumulated such a large surplus, unless we reinvest this money in some fashion I think properly it should be paid in dividends."

X-Q. 371. Now, suppose at that same meeting, I said to you, "Mr. Merriman, they tell me at the club that all kinds of people are hoarding currency in their bank deposit boxes. That being true, I want to keep a lot of cash around. It looks black, and cash certainly is power."

Would you have thought it unreasonable for me to say that to you? A. No, sir.

X-Q. 372. Suppose I had said to you in that meeting, "Mr. Merriman, I am worried about that New York Central thing. A receivership here might not be out of the cards, and I would certainly like to have some cash in the till if a blow like that struck us."

Would that speech of mine have sounded unreasonable to you? A. In 1930?

X-Q. 373. Yes. A. Yes, sir.

X-Q. 374. Well, suppose I take you to a directors' meeting in 1933, and you are as always for refinancing, and I am on the conservative side; saying I would like to have money enough to pay these debts, and I said to you, in 1933, "Mr. Merriman, I don't like the looks of the railroads. Receiverships are coming pretty thick, and we will be plenty worried if there is a receivership of the New York Central, and I would like to have some cash in the till if that blow strikes us."

Would you have thought that speech of mine unreasonable? A. No, sir.

X-Q. 375. Now, Mr. Merriman, let us suppose that at this 1930 directors' meeting, I just smiled to you, and say "You impress me, Mr. Merriman. What do you say we ought to declare out this year?" What would you then have said to me? A. Well, I haven't given that matter consideration. That was not part of my preparation, matter of what I would have considered at an unknown date in 1930, the amount that should have been distributed by the Chicago Stock Yards Company.

X-Q. 376. Well, will you consider it now? Just think back and tell me what you would have said to me when I acceded to your view and said, "O. K., we will declare some more out this year. Now, what do you say we had better declare out?" A. This is merely an offhand opinion.

X-Q. 377. That is what we directors have to act on. *A.* No, sir; I don't think directors have to act that way.

X-Q. 378. Well, in any event, I doubt if they knew more about their situation then than you know about this situation, having studied it since last November, and you an expert. *A.* I would have said that the payment by this company in 1930 of 60 percent of net income would have been a conservative dividend for it to have paid in view of its position during last year.

X-Q. 379. If I had acceded to that view of yours and said I would stand for 60 percent, you and I would have been friends and gone to lunch together all right; wouldn't we? *A.* Yes, sir.

X-Q. 380. All right. Now, let's meet again next year, in 1931, and we have our argument over it again, and you are very convincing, and I say to you, "Well, O.K., Mr. Merriman, I think you are kind of careless with our cash, but what do you want to declare out this year?" What would you then have said? *A.* I believe in that year I would have either said 50 or 60 percent.

X-Q. 381. Either fifty or sixty. You are coming down a little, I notice, aren't you? *A.* Yes, the situation was worse in

X-Q. 382. I didn't ask you why. *A.* —in 1931.

X-Q. 383. I just said I noticed that you were coming down.

The Member: How much is that in dollars at 60 percent in 1930 or 60 or 50 percent in '31?

The Witness: It would be, in '31, approximately $1,500,000.

The Member: Instead of $400,000?

The Witness: Yes. And in 1930, it would be about $1,800,000.

X-Q. 384. (By Mr. Welch). Now, let's go to '32, and sit down at our directors' meeting and let's assume that you

see your old friend Welch looking awfully gloomy when he comes in this year, because you remember that was an awfully black year; don't you?

The Witness: Pardon me. I gave Your Honor the wrong figure. I was looking at '29 earnings. That would have been approximately $1,800,000 in 1930, and $1,175,000 in 1931.

The Member: That is $1,800,000 as the 60 percent?

The Witness: Yes, sir.

X-Q. 385. (By Mr. Welch). Now, I will start over again with the year '32, when we meet again for our declaration, you see. And I ask you to assume, if you will, that I come in looking sort of gloomy and worried as most business men did, and let's assume that we have our old fight over again, I claiming that we ought to keep cash, and you say, "No, I am a pretty gay spender," and I accede, but reluctantly.

What do want to take out of the business in that black year? *A.* I think 50 percent is the lowest—

X-Q. 386. Fifty percent? *A.* —I would have advocated under the circumstances.

X-Q. 387. Now, let's meet once more, and I am being this gracious fellow and acceding to your views. We meet in '33, and this time I say to you, "Mr. Merriman, this balancing of yours has got me worried. We have just been cracked 10 millions in the Chicago banks. I don't think you ought to go as strong as you have been going."

What would you have pushed out of the Maine Company in that year over my objection, although I really finally accede to your view? *A.* I would have said your statement is erroneous, Mr. Welch. "We have been in the process of encountering losses as a result of the Chicago bank situation for a period of certainly, at least, two years, and the dividend policy of 1931 recognized that fact, and I would again pay 50 percent."

X-Q. 388. Fifty percent.

The Member: Can you give me those amounts for '32 and '33?

The Witness: Yes, sir. In '32, it would be $1,100,000, in round figures.

The Member: That is what you say would be 50 percent?

The Witness: Yes, sir.

The Member: Instead of the $400,000?

The Witness: Yes, sir. And in '33, it would be $1,120,000, in round figures.

X-Q. 389. (By Mr. Welch). Now, Mr. Merriman, suppose that at that same 1933 directors' meeting I said to you, "Mr. Merriman, if you look at this whole enterprise you will find we are in the red this year." A. Yes, sir.

X-Q. 390. Would you still have said you wanted a dividend declared? A. I would have said, "We have had certain large non-recurring losses of a type that every enterprise might expect once in a generation or once in a lifetime, and just as we had a large non-recurring profit in 1932, and I think our stockholder is entitled to stability in his dividends, and I think the fact that the surplus position of our company has held up as well as it has, under the circumstances is a remarkable achievement, and I see no reason in view of the fact that the bank difficulties are now reasonably out of the way, and we begin to recover cash in the course of time on these subordinated deposits, that we should be ultra-conservative in view of the fact that the dividend represents such a provision of 50 percent leaves us a very substantial surplus in the last few years."

The Member: Well, you would have said that a 50 percent dividend should be declared?

The Witness: Yes, sir.

The Member: Fifty percent of the earnings should have been declared in dividends?

The Witness: Treating the bank losses of 1933 as non-recurring losses of our subsidiaries.

X-Q. 391. (By Mr. Welch). Now, suppose, Mr. Merriman, that in that 1933 directors' meeting I had had this chart in there, and I said to you, "Look here, Merriman, see how we climbed up the hill." I am speaking of Exhibit 45. "From '24 to '31, and see how we pulled the load of what we had to do down somewhat, and look what you are doing to us. We are slipping off again. And in view of that, Mr. Merriman, I would like to go back to that old comfortable dividend of $400,000 a year."

Would you have thought that suggestion on my part unreasonable? A. I would have said, "It was unreasonable in view of our failure to take appropriate action in retiring the obligations that represented the red columns. We should have paid more attention to pulling down that red column all of the time since we could buy our securities of our own subsidiary companies at such large discounts. Cash would be better applied in that fashion, in my opinion, than allowing it to stay idle in the bank."

X-Q. 392. O. K.

Then, Mr. Merriman, suppose I say to you, "I have been hearing you tell me that for years, and I am going to plunk for your theory." Would you have been happy if I would have taken the surplus funds of the company and gone out and bought all of the securities I could have bought at prices below par? A. I would have been happy if you had bought them on a reasonable basis.

X-Q. 393. Right. And let's assume that in 1933 I could have taken everything in the corporate treasury and bought bonds of the subsidiaries at a discount, you would have given me three cheers had I done so and declared no dividend then, wouldn't you? A. I still think our stockholder would have been entitled to a reasonable dividend in view of the

fact that that very action would have created a very large additional surplus for our company.

X-Q. 394. But remember, I am always the only stockholder and I keep saying to you, "Mr. Merriman, I don't care about myself. I love this company. I want to leave it as a strong company when I die, and won't you go with me now? You have been preaching all these years that we ought to buy the bonds of our subsidiaries. Won't you go with me and we will take all we got in the world and go out and buy them as far as we can and pay no dividend."

You would certainly have had to go along with me, wouldn't you? *A.* If you were the sole stockholder, I would certainly have had to go along with you, if that was your desire.

X-Q. 395. Now, just one more thing, Mr. Merriman. When we talked about these years '30, '31, '32, and '33, you started saying 60 percent might go out. *A.* Yes, sir.

X-Q. 396. And the next year, in '31, 50 to 60? *A.* Yes, sir; I think I said 50 to 60.

X-Q. 397. And the last two years 50? *A.* Yes.

X-Q. 398. It follows that you are in favor of some accumulations; aren't you? *A.* I have given you merely an offhand opinion as to what I would have done in those particular years.

X-Q. 399. And what you would have done would have been to have plunked for the theory of some substantial accumulations, wouldn't you? *A.* I am not certain about that. I have given you, as I have said, an offhand opinion.

X-Q. 400. When you plunk for the theory that you would declare out 60 percent, you are plunking for the theory that you will accumulate 40, aren't you? *A.* Yes, sir.

X-Q. 401. And when you plunk for the theory that you will declare out 50, you are plunking for the theory that you will accumulate 50, aren't you? *A.* Yes, sir.

X-Q. 402. So the theory of accumulation in some figure for the 1940 crisis is subscribed to by you, isn't it? A. I don't consider that there is a 1940 crisis.

X-Q. 403. Strike out the word "crisis."

So that the theory of some accumulation for the 1940 liquidation of the Jersey Company is subscribed to by you? A. No, sir. The theory of some accumulation is based on the fact that it is always wise to retain some proportion of your earnings for unforeseeable difficulties or unforeseeable opportunities, either one, and that is the basic theory on which I would tend to reserve a surplus as a matter of insurance against the unforeseeable.

X-Q. 404. And the difficulty, Mr. Merriman, of liquidating the Jersey Company in 1940 was entirely unforeseeable in '30 to '33— A. I would—

X-Q. 405. May I finish my question, sir? A. Certainly.

X-Q. 406. What difficulties might, in fact, be met in liquidating the Jersey Company in 1940 and ridding this enterprise of its debt were, of course, entirely unforeseeable in the years 1930 to '33, weren't they? A. Yes, sir; and in view of that fact I would have advocated the elimination of the Jersey Company at or prior to 1933, whenever financial conditions were good.

Mr. Welch: I think that is—

The Member: At or prior to what?

The Witness: 1933, whenever financial conditions were good.

X-Q. 407. (By Mr. Welch). Don't you also mean at or prior to 1940, too? A. Yes, sir.

The Member: I don't understand what 1933 plays in your mind as to the elimination of the New Jersey Company at or prior to 1933.

The Witness: Mr. Welch has had me at a theoretical directors' table, and I would have considered long before

1933. Your Honor, had I been at such a directors' table, that the New Jersey Company played no useful function in the Chicago Stock Yards enterprise, being virtually nothing but a conduit from which money flowed from operating companies up to the Chicago Stock Yards Company, and I would have tended to eliminate that because of the nuisance that might be created by a minority common stockholder, even though his 9 percent dividend was guaranteed. There would be a question in my mind as to what he might do after 1940.

The Member: Aren't you interjecting an entirely new suggestion now than heretofore? As I understood, the alternative suggestions have been as to whether the New Jersey Company should be liquidated or eliminated, as you speak of it, at the expiration of its charter in 1940, or should be refinanced and by some means or other projected into the future. Now, do you mean to add to that alternative suggestion the third suggestion that it should, indeed, have been eliminated long prior to the expiration of its charter in 1940?

The Witness: It might well have been eliminated prior to that time, the elimination being timed when the refinancing of any obligations that it had outstanding would be comfortable, would be accomplished under normal financial conditions.

The Member: Well, do you take 1933 as that time? Is that why you said 1933?

The Witness: No, sir; I don't consider that 1933 would have been a good time to do it, but I would have considered that in 1933 the company might well have looked forward to doing that, when we had a normal market for the sale of bonds and high grade fixed interest-bearing stocks, which I think in '33 was—at the end of 1933 was certainly in reasonable prospect within two years, if not earlier.

The Member: Well, now, then, as I understand what you intended to have me understand was that during the years 1930 to 1933 it would have been the part of wisdom for the corporation to have contemplated the earliest elimination of the New Jersey Company when financial conditions permitted?

The Witness: Yes, sir.

The Member: Not to wait until 1940?

The Witness: Yes, sir.

The Member: And certainly not to project it beyond 1940?

The Witness: Yes, sir.

The Member: Is that the situation?

The Witness: That is.

The Member: And you thought that could have been reasonably determined in the years 1930 to 1933 as something to be contemplated within the next two or three years; that is to say, around 1935 or 1936?

The Witness: Yes, sir.

The Member: Is that your position?

The Witness: Then it would have been advisable to consider that.

The Member: Yes.

X-Q. 408. (By Mr. Welch). I am going to take up just two trivial matters with you, which I had in mind, and ask you as to these: Have you available Poor's Railroad Manual, Volume 38? If not, I think we have it. A. It may be in the library upstairs. I do not have one here.

Mr. Welch: I think there is one in the courtroom.

(The volume referred to was handed to the witness by Mr. Green.)

X-Q. 409. (By Mr. Welch). Would you look at the Chicago River and Indiana Railroad that you were testifying about yesterday? Have you got the page, sir? A. Yes, sir.

X-Q. 410. Do you remember how you told us how splendidly even the earnings of that company were and what a comfortable feeling that should give anyone who is on the lessor end of the lease? A. Oh, I didn't say they were splendidly even. I thought they were very good.

X-Q. 411. Very good. I am always using words that witnesses don't use, and I am very much to be criticized for it.

You said they were very good? A. Yes, sir.

X-Q. 412. Will you follow along with what you have there and tell us how very good they were in 1934? First, let's have the last year you gave us, which was what? A. '33.

X-Q. 413. Was what? A. The net income?

X-Q. 414. Yes. A. Net income after rental and other charges was $715,728.

X-Q. 415. Now, take '34. That again is very good, isn't it? A. That is $1,010,691.

X-Q. 416. Now, let's take '35. Is that so very good? A. '35, the figure shows $387,940, with some sort of a note. The note says, "Restated for comparative purpose." I don't know just what that note means.

X-Q. 417. Well, if you don't, I don't.

Let's take 1936. How very good are they in that year? A. $256,176.

X-Q. 418. We are on the down grade, aren't we? A. Yes, sir; they have declined.

X-Q. 419. Tell us where we land in '37, will you? A. There is a loss after charges of $130,000.

X-Q. 420. I see.

Now, let me turn to Produce Terminal a moment. You remember you told us yesterday that Produce Terminal had had remarkable earnings right through the depression, and that it was a steady producer of revenue. Do you remember? A. Yes, sir.

X-Q. 421. And a comfortable thing to look at. Do you remember that? A. Yes, sir.

Mr. Welch: May I have Exhibit N, please?

(The exhibit was handed to Mr. Welch.)

X-Q. 422. (By Mr. Welch). I think you told us that the earnings of Produce Terminal were so steady and so comfortable that that corporation ought to be capitalized for four or four and a half millions, did you not? A. Yes, sir.

X-Q. 423. Well, will you glance at Respondent's Exhibit N and tell me what profit Produce Terminal showed in 1935, this steady producer of pleasant income? A. This statement reads: "Net income per books, $84,360," in 1934.

X-Q. 424. I was asking about 1935. A. I beg your pardon.

$17,998.98, red figure, in 1936.

X-Q. 425. Does that exhibit introduced by the Respondent in the case shake you at all as to the steadiness of that income from Produce Terminal? A. That—

X-Q. 426. Just "yes" or "no." Does it shake you? A. Yes, sir. It is some evidence that the income has declined.

X-Q. 427. Does that exhibit introduced by the Respondent shake you at all, in your opinion, that Produce Terminal was worth four or four and a half million dollars? A. As of what date?

X-Q. 428. In 1935, sir. A. Oh, I would not express any opinion whatever as to Produce Terminal in 1935, because I do not know what property it had, whether it sold half of its property, whether it did something after 1933. I have no information whatever. I consid red no information in this case subsequent to 1933. It is against my basic policy to consider information of a later date.

X-Q. 429. Curiously enough, I can agree with you. I tried to stop the case in 1933. A. Yes.

What kind of company Produce Terminal was in 1935 I don't know.

X-Q. 430. It was not the kind that is worth four million and a half, of what you see there from earnings, was it? A. Not on the basis of those earnings; no, sir. If those are the correct earnings of the property, it certainly had deteriorated in value to some extent.

Mr. Welch: That is all.

The Member: Wait just a minute, Mr. Merriman. You have something more; have you not, Mr. Clark?

Mr. Clark: Yes, I have some questions on redirect.

Redirect Examination.

Q. 431. (By Mr. Clark). I show you a document, Mr. Merriman, and ask you if that is the one which was exhibited to you by Petitioner's Counsel in the course of cross examination as to your testimony as to whether Petitioner was a holding company and nothing more. A. Yes, sir; it is.

Q. 432. What is that document A. That document is the report and recommendations of the Examiner for the Secretary of Agriculture, Bureau of Animal Industries, Docket No. 472, Secretary of Agriculture, complainant, v. Union Stock Yards and Transit Company of Chicago, Respondent.

Q. 433. Well, now, what does that amount to? Do you know what it amounts to, this sort of report and recommendation of the Examiner?

Mr. Welch: Objection.

Mr. Clark: I am asking—

The Member: He is asking if he knows. He may answer whether he knows or not.

A. I believe so.

Q. 434. (By Mr. Clark). Well, will you state—

Mr. Welch: What it amounts to?

Mr. Clark: Yes; what it is.

Mr. Welch: Objection.

What it is?

Mr. Clark: Well, what it means, what place it has in the Department of Agriculture, or the Secretary of Agriculture's findings, if he knows. He said he does.

Mr. Welch: What place it has? It may have a place in the library.

Mr. Clark: What its weight is.

Mr. Welch: What its weight is in this courtroom?

Mr. Clark: No, sir; in the Department of Agriculture.

Mr. Welch: In the Department of Agriculture.

Mr. Clark: Yes.

Mr. Welch: Well—I don't care. Go ahead and answer.

A. I understand it to be the report and recommendations to the Secretary of Agriculture to aid him in his decision in this case.

Q. 435. (By Mr. Clark). Is it or is it not a decision on the part of the Secretary of Agriculture? A. It is not a decision on the part of the Secretary of Agriculture, so far as I understand the document from reading it.

Q. 436. Do you know whether stock yards companies must be registered under the Act of 1920 with the Department of Agriculture? A. Yes, sir. I believe it is the Act of 1920. I am not certain of the date of the Act.

Q. 437. Well, approximately. A. Yes, sir.

Q. 438. Have you inquired whether the Chicago Stock Yards Company is so registered? A. Yes, sir.

Q. 439. And what did you find out? A. I found that it had never registered as a stock yards company.

Q. 440. Mr. Merriman, do you think, in your opinion, that if the Maine Company had distributed its income in reasonably substantial amounts, there would have been the bank

losses which were suffered, to which reference has been made? A. I don't think the two had much relation to each other.

Mr. Clark: That is all.

Recross-Examination.

X-Q. 441. (By Mr. Welch). Mr. Merriman, you know, do you not, that the Transit Company files tariffs with the Secretary of Agriculture and must operate under those tariffs? A. Oh, yes.

Mr. Welch: That is all.

The Member: I do not understand this ten times scale that you have used, the lines superimposed on Exhibit 45. I am completely befogged about that. What is the theory of that?

The Witness: The theory—

The Member: Perhaps you had better tell me what you did before you tell me what the theory is.

The Witness: May I go to that chart, Your Honor?

The Member: Yes.

(The witness left the witness stand and approached the chart.)

The Witness: I set a scale for this figure of net income of the Maine Company, which I superimposed on this chart, of $500,000 for the $5,000,000 figure of the asset scale, and $1,000,000 for the $10,000,000 asset, the figure shown on the scale, million and a half, two million, and two and a half million, respectively, where the fifteen million and twenty million and twenty-five million figures are shown on the right-hand side of the chart.

Starting in the year 1914, had I used this identical scale to represent these surplus earnings, the maximum that my superimposed line would have reached was about half way up to the five million mark, if I had used the identical scale

for plotting the earnings. I therefore increased the scale so as to make the arithmetical relationship between the points on the scale exactly the same as it is on this scale, but in order to give a visual representation of how the net income above charges had tended to increase I raised the scale to a figure ten times the actual. I adjusted the scale so that the $500,000 would be equivalent to that of the five million dollar figure on this scale, and I did that in part because there is an old popular rule from the prospectus of securities that ten times earnings is a very popular capitalization.

Now, this is not the earnings that is plotted on this chart; it is net income over and above the fixed charges of the Maine Company and its subsidiaries, so it is surplus over net income; and down in this period (indicating) it started at a figure, as I remember it, of $167,000 in 1914, and it rose so that it was in the neighborhood of two or two and a half million dollars per annum in the latter part of the period.

Does that make it clear to Your Honor?

The Member: No. I am completely befogged by it. I do not understand it at all. I thought I understood the rationale of this chart, No. 45, as for whatever weight it might have, indicating a comparison of the amount needed with the amount available. That is stating it perhaps too simply.

The Witness: Yes.

The Member: That is my understanding of the loose meaning of this chart.

Now, how does your line, your curve, fit into that? Does it change that significance? I confess that it changes my picture entirely when you impose two different prospectus in the same picture, if you know what I mean. You have got two things on the same scale. It means something. Now you are changing the scale, and I just do not understand it.

I would like to have you take all the time that you think you need to put it into my mind.

The Witness: The purpose, Your Honor, is to effect on this a visual representation of what I might term to be the earnings margin of safety for our outstanding obligations. Now, the outstanding obligations of this enterprise are shown by the red columns, and they carry with them certain fixed charges of interest and dividends. The margin of safety over those fixed charges and dividends, in general, is represented by the net income of the Maine Company, since in most years it tended to draw out virtually all of the earnings of its controlled companies. That net income in relation to the red line, starting in 1914, was a very small proportion of the red line—of the red column. The net income gradually rises, and by 1922 it averages nearly as high as these red columns, about 80 percent of them at the top of the red columns.

The Member: Now, take 1922—

The Witness: That means that we have surplus income for financing this very small difference between the blue—the top of the blue column and the top of the red column. That difference represents the amount for which we do not have cash and other resources that we consider as virtually equivalent to cash.

The Member: Well, what is the figure for 1922 from which this blue column shown on Exhibit 45 should be elongated alongside of the red column upon the same scale?

The Witness: I am not speaking of the elongation of the blue column at all, Your Honor. I am speaking about a visual representation of the margin of safety we have for financing this business, the requirements of this business, on a basis of ten times earnings. That is the effect of this representation that I have put on this chart.

Here (indicating) we have a figure of approximately, for

1933, 18 million dollars, or 17½ million dollars of quick resources to meet total obligations of about 28 million dollars. That means this gap between here and here (indicating) is about 10 million dollars. Now, in that year we have about $2,200,000 of surplus income over all our charges. It represents the margin of safety, it represents the income we have that we could finance this son, this small margin, assuming we choose to pay off all the other obligations.

In this earlier year we have 35½ million in 1914, approximately of obligations, and we have about 6 or 6 and a fraction millions of cash resources, so that the difference in the two columns is about 29 million dollars, and our margin of safety in the year 1914 is $167,000, as shown by the red line—the blue line that I superimposed on that chart.

The Member: Does that ten times business that you used, this scale—is it merely a use of the rule of thumb, that property is usually worth ten times its earnings? Is that what you mean by it?

The Witness: No, sir. The ten times scale is put on to show the correlation of the movement between the blue column and the other figures—not the blue column, but the blue line and the other figures on the chart, in order to show that correlation, and the scale works out so that we do get this ten times earnings effect, but this blue line does not include the earnings that are necessary to pay these fixed charges, because they have already been deducted from the net income, they have already been paid.

The Member: I suppose after I read this record I will understand it. I do not understand it now.

The Witness: It is difficult, Your Honor, for me to find words, with laryngitis bothering me, to explain it more fully than I have.

As I see the significance of Petitioner's Exhibit No. 45,

it is a showing of the growing cash resources that the company has and a certain trend toward diminution of its fixed liabilities. Now, if I were to examine that from the standpoint of the question of what we should do, whether we should continue to build up cash, or whether we should adopt some other policy, I would examine it in the light of the earnings that we had available for the building up of this blue column, until it reached a figure higher than the red column, or for the purpose of ascertaining whether we had a fully ample margin of excess earnings on which to finance this obligation—this collection of obligations.

At any time in the period before 1922 that margin of earnings to finance the amount represented by the difference in the length of the blue and the red lines was, in my opinion, light, and since that time it has become, in my opinion, more than ample.

The Member: Well, I will let this go. I will stop now, because it is lunch time, but if at the reconvening after lunch Counsel think that that can be elucidated in a more primitive language, so that I can understand it, I would be grateful for it, but I am not going to pursue it any further now, because it is, apparently, so far over my head, for some reason, that I cannot get started on it. I may suggest, however, that to make it effective it might be well for the Respondent, instead of superimposing the blue line on Exhibit 45, the Respondent prepare his own exhibit, with a red bar, a green bar, or yellow bar, or anything else, instead of the present blue bar, so that I may disassociate in my own mind the so-called relation, or ratio, which Exhibit 45 has instilled in my mind from the ratio which the new exhibit is intended to give.

Perhaps it may be that my confusion is an attempt to think of two things at the same time, or keep in mind two pictures at the same time. I do not know what the explana-

tion of my own apparent stupidity is, but it is there, and I am suggesting to you that you might be able to clear it up. I do not want to go into the decision of this case with an exhibit by an intelligent witness which is completely over my head. After all, as stupid as I may seem to be, it is I who has got to decide this case, and the conceptions upon which I am to decide it are mine.

Now, you can see that there is no effect of your exhibit at all, and that is the situation right now. I tell you that with perfect frankness in order that you can improve it, if possible.

We will suspend until a quarter after two.

(Whereupon, at 12:45 o'clock p. m., a recess was taken until 2:15 o'clock p. m. of the same day.)

Afternoon Session.

The Division resumed hearings at 2:15 o'clock p. m., whereupon the following proceedings were had:

Mr. Clark: Relative, Your Honor, to the discussion which was had with Mr. Merriman this noon before recess, I have taken the matter up with him, and he says that he believes the better course from our point of view, if agreeable to Your Honor, would be for him to draft another chart, an entirely new chart, which he won't be able to complete until tomorrow at some time. Then we will file it with your leave, and he will resume the stand, if agreeable to you, and explain it.

The Member: Very well.

Mr. Clark: I don't think at this time that I will ask to withdraw our RRRR exhibit. I might want to eventually, but I don't know. There it is for whatever it is worth.

Mr. Pierson: Dr. Atkins, will you take the stand?

MR. PAUL M. ATKINS

called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Pierson). Will you state your name for the record, Dr. Atkins? *A.* Paul M. Atkins, A-t-k-i-n-s.

Q. 2. Where do you live? *A.* Montclair, N. J.

Q. 3. Where did you live prior to moving to Montclair? *A.* I lived for some 11 years in the City of Chicago.

Q. 4. Will you state your education and experience? *A.* I received my Bachelor of Arts degree from Yale University in 1914.

In the following year, while at work in the City of New Haven, I completed the work for my Master of Arts degree in economics, and I obtained that degree in 1915.

During that year, 1914 and '15, I was cost accountant for the Acme Wire Company in New Haven.

In the fall of 1915, I went to Gray & Davis, in Cambridge, Mass., to lay out a cost accounting system for them, and then I went to what is now the Square D Company. It was then known as the Detroit Fuse & Manufacturing Company in Detroit, Mich., to install a system of production control and cost accounts, and to act as production engineer for them.

About a year later I was recalled to the Acme Wire Company, in New Haven, to become their management engineer, and I remained there until the fall of 1917, when I entered military service.

I was recommended for my commission and went overseas in March, 1918. I continued with training and received my commission in April, I think it was, or May, 1918, and then was assigned to a heavy artillery school in Clermont,

Ferrand as one of the instructors. Shortly after the Armistice, I was appointed one of the specialists in the section of political, territorial, and economic intelligence of the American Commission to negotiate peace in Paris, and I also served as the American secretary of the sub-commission of the Peace Conference on Czechoslovak affairs.

Upon my return to this country, I became a senior engineer on the staff of L. V. Estes, Inc., of Chicago, consulting industrial engineers. I remained with them for about a year, and then I joined the faculty of the University of Chicago in the School of Commerce and business administration to take charge of the courses in industrial management and in industrial cost accounting.

In the years '24 and '25 I received a sabbatical leave, at which time I spent in Europe partly in travel and partly in study at the University of Paris, from which university I received my doctor's degree in economics, in 1925.

During the time that I was at the University of Chicago I continued my studies in business administration and economics at the University of Chicago and also took courses in mechanical and electrical engineering at Armour Institute of Technology, at Chicago.

I completed my contract with the university the academic year of 1926, and I then went to the firm of Ames, Emerich & Company, investment bankers in Chicago, with offices in the main office in Chicago, branch offices in New York, Philadelphia, St. Louis, Milwaukee, Los Angeles, and San Francisco. It is a large underwriting house, underwriting and distributing high grade securities, primarily bonds and preferred stocks. I went to them primarily to carry on investigations of their industrial underwritings, or proposed industrial underwritings, which necessitate my making a detailed analysis of the histories of the companies, business histories, the accounts, the policies of these vari-

ous companies whose securities they proposed to have underwritten.

Not long after I joined them they asked me to undertake an investigation of the investments of banks and bonds, and I made what I believe is probably the first comprehensive investigation of the investment policies of banks and the types of securities which they held and the types of securities which, upon the study, seemed wise for them to hold.

As an outgrowth of this study, I organized in Ames, Emerich & Company, an investment counsel department, in the first instance for service to banks, but subsequently enlarged to render service not only to individuals but also to corporations which had surplus funds available for investment.

In January, 1931, I was given leave of absence by Ames, Emerich & Company to accompany Professor Kemmerer, of Princeton University, as the public credit member of his financial mission to Peru. Then my primary task was to investigate the public debt of that country and offer suggestions for ways and means of dealing with that situation. I am sorry to have to say that they did not adopt the suggestions made by the commission, but I think the history of that debt is pretty well known.

Upon my return I rejoined the staff of Ames, Emerich & Company and stayed with them through a substantial part of the year 1931.

In January, 1932, I was appointed special liquidator of securities for the Comptroller of the Currency and opened up for him an office located physically in the Federal Reserve Bank of New York for the purpose of liquidating the securities of all kinds owned by insolvent national banks. I continued in this position for some five years. During this time I had entire charge of the operation of this of-

fice. It was my discretion to decide what was to be sold, when it was to be sold, at what prices it was to be sold, and what quantities, and to or through whom.

During these five years I liquidated securities having a par value of something in excess of $250,000,000, raising cash from the sale of these securities in excess of $150,000,000. During that time the office handled in excess of 10,000 different issues of securities, stocks and bonds, for some 1200 odd banks for whom we proceeded, and I did business with something over 350 different brokers, dealers, including a few of the individuals, in all parts of the country. It was to or through these brokers, dealers, that I disposed of these securities. The securities included, of course, in addition to a large volume of securities listed on the New York Stock Exchange, and other exchanges, a very substantial quantity of unlisted securities of all types.

At the end of five years I resigned from that position and accepted a position as a trustee and treasurer of the Alfred P. Sloan Foundation and also as treasurer of Mr. Alfred P. Sloan's several personal holding companies.

At the end of the year I resigned to go into private practice.

The Member: At the end of what year?

The Witness: At the end of my year then, which is in April, 1938. I resigned from that position to go into private practice as an investment counsel and consulting economist.

I have at times in the past been more or less writing on business and related subjects. I have had published three books on cost accounting, one on industrial management, two books on economic conditions, one in Europe and one in Latin America, and a book on the secondary reserves and investments of banks, together with one or two minor books. I have also had published something over 400 ar-

ticles in such papers as "The New York Times Analyst," the "Chicago Journal of Commerce," the "Bankers Magazine," the "Bankers Monthly," what used to be called the "Journal of American Bankers Association," and other technical magazines and papers.

Q. 5. (By Mr. Pierson). Have you previously testified before this Board? *A.* I have, sir.

Q. 6. To what extent? *A.* I have testified, I believe, in some three cases before this Board prior to this time. The first case in which I appeared was the Huntington will case, in Los Angeles, some 3 years or more ago, which involved the valuation of the securities of a personal holding company. Subsequently I have testified in cases involving the valuation of the stock of certain industrial concerns, the J. J. Newbury Company and the New Jersey Zinc Company.

The Member: Are those the styles of the cases?

The Witness: No, sir; those were the securities whose value was under consideration in those cases.

The Member: Do you know what cases they were?

The Witness: The J. J. Newbury case, I believe, appeared in that name. It involved the question of taxes on certain gifts made by Mr. and Mrs. Newbury for a trust fund. I am sorry to say that I have forgotten the name of the case in which the New Jersey Zinc Company stock figured. It had nothing to do with the New Jersey Zinc Company, however, but it involved the valuation of its stock. It was another gift tax case.

Mr. Pierson: I expect to prove by this witness, or will have the witness testify in rebuttal, in regard to the market for the bonds of the Maine Company, the New Jersey Company, and the Railroad Company, and he will give opinion testimony as to the possible ways of meeting the financial situation of the companies in the so-called family group as the record indicates may exist in 1940. The wit-

ness will also give opinion testimony as to whether Petitioner is other than a holding company, and will give further opinion testimony as to the value of the common stock of the New Jersey Company held by the Maine Company in the years 1939, 1932, and 1933.

Mr. Welch: Will you excuse me a moment while the stenographer gives me that?

(Record read.)

Mr. Welch: In so far as the witness will testify in rebuttal in regard to something about the market for bonds, of course his qualifications, I take it, are admitted. That I won't challenge. The second thing he is offered for is to testify as an opinion witness on the ways of meeting the financial needs of the enterprise in 1940. I observe in his qualifications no trace of any corporate management, no trace of ever having acted as a director or officer of any corporation of whatever size, and I suggest to Your Honor that in your discretion you might well rule that he is not qualified in that field and I shall object to testimony in that field. In the third place, it is said that he will testify as to his opinion that the Maine Company, whether or not it was anything other than a holding company. Your Honor already knows my position on that. I don't think the evidence is admissible in any event, and I am sure that nothing in this witness' qualifications, the statement of his qualifications would seem to qualify him as an expert in that field. I shall therefore object to his testifying as an expert in that field. Latterly, he will offer his opinion as to the value of the common stock of the New Jersey Company, and while I seriously doubt his qualifications, I should not object to his testifying if he wishes in that field.

The Member: I will overrule all of the objections on all of the grounds.

Mr. Welch: And save my exception, which I think is quite valueless.

The Member: Yes.

Q. 7. (By Mr. Pierson). With respect to your qualifications, Dr. Atkins, there was one more question that I would like to ask: If you ever analyzed the dividend policies of corporations? *A.* I had to do that on numerous occasions at the time when I was investigating corporations for Ames, Emerich & Company, when they were giving consideration as to whether or not they wished to underwrite any of their securities, that was done, of course, both in cases where the decision was to effect underwriting and decisions where it was decided not to undertake underwriting.

Q. 8. Dr. Atkins, when did you first begin a study of the Chicago Stock Yards enterprise? *A.* I began this study shortly after the middle of November, 1933.

Q. 9. And at whose request? *A.* At Mr. Clark's request.

Q. 10. Will you outline the study which you have made in that regard? *A.* I will endeavor to do so.

I began this study with a careful examination of the information contained in the preliminary copy of the stipulation, and the several exhibits which were attached to it, and in so far as that information—source of information is concerned, I have continued that with the final copies of the stipulation and of the exhibits that were subsequently attached to it.

I further made an investigation of the railroad situation, the stock market—the stock yards situation, studying not only the history of this company but the history of other stock yards in so far as that was available in published records.

Also I gave some little consideration to other lines of

business, more especially in the public utilities and the real estate situation.

Continuing in a more general way, I studied the general economic and business developments during the years immediately prior to the period under consideration; that is to say, the years 1930, '32, and '33, to see what transpired during that period, giving rather peculiar consideration to information contained in the New York Times Analyst and the Commercial and Financial Chronicle.

I also studied the history of a rather widely diversified group of companies to see what their financial experience had been during this period, and I also studied the record of the security markets as primarily recorded in the Commercial and Financial Chronicle, and in the published volumes of the National Bond Quotations Service.

That, in general, I think, summarizes the study which I have given to this case.

Mr. Welch: Mr. Pierson, I think perhaps I should have an opportunity to ask one or two more questions. That is some further qualification now, I think. Do you agree that those are further qualifications to enable him to testify as an expert?

Mr. Pierson: No, I don't think it is. I am merely asking the extent of his study.

Mr. Welch: Right.

Mr. Pierson: In regard to this Stock Yards enterprise.

Mr. Welch: I should like to be allowed to ask just one or two questions in connection with the statement that he has made of the study he has made.

Mr. Pierson: That is all right, Your Honor.

Cross-Examination.

X-Q. 11. (By Mr. Welch). I take it, you are about to express an opinion based on the study that you have made;

is that right, sir? A. I expect to be called upon to express an opinion.

X-Q. 12. And you intend to base that opinion on all of the things that you have studied in preparation to testifying? A. I expect to express that opinion on the results of my study.

X-Q. 13. And all of your studies? A. Yes.

Mr. Welch: Then I shall further object to his testimony because it is obvious that he has studied a considerable quantity of material that is not in evidence in the case, and that will be a fatal defect in his opinion because he has already said it was based on evidence outside the case.

The Member: I will overrule the objection.

Mr. Welch: And may I have another exception?

The Member: I shall be very glad if the cross-examination will elicit the extent to which that is true.

Direct Examination (Continued).

Q. 14. (By Mr. Pierson), In stating your study, Dr. Atkins, it was not clear as to whether or not you had made a special study of the prices and volume of the trading of securities of the companies in the Chicago Stock Yards enterprise; that is, more particularly, the New Jersey Company's 4's and 5's, and the Maine Company 5's, and Elevated Railroad Company 4's. A. Yes; I made a somewhat detailed study of certain of those securities, in particular, the listed securities of the New Jersey Company.

Q. 15. Did you make a study of the income of the Chicago Junction Railway Company, termed the Railway Company in this case, and the Chicago River and Indiana Railroad Company? A. I did.

Q. 16. And what was the purpose of your study in that connection? A. I find that the lease of certain properties either owned by the Chicago Junction Railway Company

or leased by it in perpetuity from the Transit Company to the Chicago River and Indiana Railroad Company was a very important source of income for the Railway Company, and through the Railway Company, for the so-called Maine Company. I felt, therefore, that before I could form an opinion in regard to this income and its possible influence upon any opinions which I might form with regard to the Maine Company, it was necessary for me to study the company from whom that income was derived under the terms of the lease.

Q. 17. And in that connection, did you also study the earnings and financial position of the Indiana Harbor Belt line? *A.* I did to a lesser extent.

Q. 18. Have you attended any of the hearings in this case? *A.* I have.

Q. 19. On what dates, do you recall? *A.* I believe I have been here at the hearings for the last three days.

Q. 20. And have you read the record in the case covering the prior hearings? *A.* I have.

Q. 21. Have you examined the exhibits of the Petitioner and Respondent, which have been introduced in evidence? *A.* I have, but in forming my opinions I have not given consideration to the data in the exhibits for the period after 1933, after the close of 1933.

The Member: You mean you examined all those income tax returns that were put in evidence?

The Witness: I have.

The Member: Of all these corporations for all of the years?

The Witness: I have examined some of them in rather haste, and I have studied some in considerable detail, sir. I don't mean to say that I examined—read every word in all of those papers, but I have tried to go through them and

pick out what seemed to me to be the essential information, and some of them I studied in considerable detail.

Q. 22. (By Mr. Pierson). Now, in the light of this, Dr. Atkins, have you an opinion as to whether the Maine Company in the years 1930, 1932, and 1933 accumulated its gains or profits in excess of the reasonable needs of the business? A. I have.

Mr. Welch: I object. He has answered it.

Now, go slowly, because I will want to object to the next one, I take it.

Mr. Pierson: I asked him if he had formed an opinion, and he says he has.

Mr. Welch: He has answered yes.

Q. 23. (By Mr. Pierson). What is your opinion in that regard?

Mr. Welch: Objection. Curiously enough, he was not offered on this ground. I was careful to listen to the offer and have it read to me. He was not offered on this ground.

The Member: Well, that is very true.

What have you got to say about that, Mr. Pierson? You didn't enumerate that as one of the things that he was offered for. Did you inadvertently omit it?

Mr. Pierson: I did inadvertently overlook that, Your Honor. That is one of the things that this witness will testify to, and if my opponent desires to make an objection at this time, or otherwise take some further action along that line—

Mr. Welch: Well, my objection would have been more passionate had he been offered on this point, because I see nothing in his qualifications that would indicate he is qualified to sit on the board of directors and weigh these troublesome questions of judgment that are so difficult to decide.

The Member: Do you want to cross-examine him as to his qualifications, or are you satisfied merely to object?

Mr. Welch: I object to it on the grounds that I have stated.

The Member: I will overrule the objection.

Mr. Welch: And save an exception.

Q. 24. (By Mr. Pierson). Will you state—

The Member: And this out of an abundance of doubt as to the propriety as to this entire method of trying on both sides, and the entire method of trying this issue. I have grave doubt as to whether the issue is one that can be tried on either side by this type of method.

Q. 25. (By Mr. Pierson). Will you state your opinion? A. My opinion is that during the years 1930, 1932, and 1933, the Maine Company did accumulate gains and profits to an unreasonable extent over and above the needs of the business.

Mr. Welch: Gains and profits to an unreasonable

The Witness: Unreasonable extent during these three years.

Q. 26. (By Mr. Pierson). Will you state your reasons for this opinion? A. I have a number of reasons for this opinion.

In the first place, I have looked at the balance sheet of the Maine Company and of its principal subsidiary companies—of the balance sheets, I should say, plural, the revised balance sheets, which I believe are in evidence, with particular consideration to the position of these companies on December 31, 1929,—in other words, the date immediately preceding the first year in question; and I find that on that date the Maine Company and its principal subsidiaries had, in round figures, $18,330,000 in liquid assets, of which, in round figures, $13,510,000 was in cash.

I next considered the experience of the several operating companies, more specifically the Railway Company, which obtained its income primarily from the $2,000,000 payable

annually under the terms of the lease of the property to the Chicago River and Indiana Railway Company. So far as

The Member: You classify the Railway Company as an operating company, do you?

The Witness: May I offer an explanation to that, Your Honor?

The Member: Yes.

The Witness: In the sense that it is a source of income to the Maine Company. As a matter of fact, it did not operate a railroad, of course; it simply leased the property. It was not in the strict sense a railroad company at all. I simply so regard it as a possible source of income to the Maine Company.

The income from this company which became available to the Maine Company seemed to me to be stable, highly stable.

I also gave consideration to the income from the Transit Company. Over a period of years the income from this company has been relatively stable, and that is engaged in an industry which belongs to a group of industries whose income has proved in the past to be relatively stable during good times and bad; in other words, the food industries as a group of companies, belong to the food industries group, have on the whole relatively stable earnings, and the income of the Transit Company is dependent primarily upon services rendered to companies in this group. As a matter of fact, it seems to me that it is probably in a better position than many other types of companies in this group, because its income is not dependent to any appreciable extent upon the values of inventories or upon the prices of agricultural products. It gets its income primarily from a service charge which is predicated upon the number or the quantity of the product handled rather than on the price.

As I look at the Produce Terminal Company during this

period, and the years immediately preceding, I find that its income has not only been stable but has shown a rather marked increase during this period and years immediately prior thereto.

The Central Manufacturing District, the trust, is subject to somewhat greater fluctuations, but none of its income during this period or prior to this period—I am referring to the years 1930, '32, and '33—were transmitted to the Maine Company.

All of these companies seem to me to be in sound condition as of this date. There was at that time, so far as I have been able to gather from my examination of the information available in regard to them, no indications that their position was not sound.

There was one company in this group, the Elevated—in addition to those named in this group, a subsidiary of the Maine Company, namely, Elevated Railroad Company, whose position was not satisfactory, but the total amount involved in this company was relatively small.

Q. 27. (By Mr. Pierson). In connection with your statement, Dr. Atkins, the Railroad Company was not a subsidiary of the Maine Company, was it? A. Not directly; a subsidiary of the New Jersey Company which in turn was a subsidiary of the Maine Company. In fact, once more perhaps I have been speaking rather loosely—the Transit Company, as I understand it, and the Railway Company, the Central Manufacturing District, and the Railroad Company, were all subsidiaries of the so-called New Jersey Company, which, in turn, was, or is still, a subsidiary of the Maine Company.

Produce Terminal Company on the dates in question was a direct subsidiary of the Maine Company.

I can see no particular reason, therefore, to anticipate as of my date, the 31st of December, 1929, any marked proba-

bility of emergency demands being made upon the resources of any of the companies in this group in the immediate future sessions emergency demands.

On the other hand, as I looked these companies over, it seemed to me that there would not be any very great demands made upon the resources for their further rapid expansion. Certainly in the case of the Railway Company there was no probability for a demand for expansion.

The business of the Transit Company, as I indicated, had been relatively stable, and with the growth of stock yards in other parts of the country I did not envisage any probability that it would need to expand any of its facilities in any major fashion.

The Produce Terminal Company during this period had been expanding, but had been doing so very largely out of its own earnings.

The Central Manufacturing District seemed to be the one which might be most likely to require funds for expansion. However, if business were to decline, I do not see any reason for expecting any large demand for the expansion of the Central Manufacturing District properties during a period of stationary or possibly declining business.

It seemed to me, therefore, as I viewed these facts, that there was no necessity for the group enterprise as a whole to look forward to an expenditure of important sums, either to meet emergencies within their own organizations or for the expansion of their several activities.

I find that the Maine Company was at that moment in possession of cash of, in round figures, some $6,600,000; that it had loaned substantial sums to its stockholder, at that time, I believe, the sole stockholder; that it had a portfolio of miscellaneous securities, which I understand are supposed to be general market securities of a liquidating nature.

In view of these facts, therefore, and in further view of the fact that the Maine Company had relieved itself of the responsibility, of the, as I understand it, legal responsibility for the payment of the principal of, I believe, all of the obligations of its subsidiaries, although it might have practical reasons for wishing to avoid those obligations, it seemed to me that as of December 31, 1929, it had accumulated sufficient assets and assets in such form that it did not need further during these years to accumulate additional funds.

Q. 28. From an examination of the stipulation which has been filed in this case, together with exhibits attached thereto and your reading of the record, hearing the testimony, and examination of the exhibits filed by Petitioner and Respondent in this case, have you formed an opinion as to whether the Maine Company was anything more than a holding or investment company in the years 1930, 1932, and 1933?

Mr. Welch: Objection.

The Member: Overruled.

Mr. Welch: Exception, please.

A. Yes, I have formed an opinion.

Q. 29. (By Mr. Pierson). What is your opinion in this regard? A. My opinion is that it was simply a holding company, a personal holding company.

The Member: A what?

The Witness: A personal holding company.

The Member: All right.

Q. 30. (By Mr. Pierson). Will you state your reasons?

A. I have a number of reasons—

The Member: Now, just a minute. That was not the question. The term "personal holding company" has become a part of the Revenue Acts. Now, if this witness is talking about a personal holding company in the lingo of the Reve-

nue Acts, it is not worth anything. If he is talking about a personal holding company in his own private lingo, it may be worth something or it may not, depending on what it is. If you ask the witness to answer your question, I will let him go on. If not, I will not permit him to go on exploring the field of the Revenue Acts.

The Witness: May I have that question again?

(The last question was read.)

Mr. Pierson: Read the one preceding that.

(Thereupon, the record was read.)

Q. 31. (By Mr. Pierson): Then, the next question, Doctor is? What is your opinion in this regard, and when I say "what is your opinion," that is without giving regard to the effect of the holding company as defined by income tax statutes. A. I at no time attempted to define it by the income tax statute. I will say simply that it is a holding company. Does that take out any possible legal definition on my part?

The Member: Do not ask me. I am not talking about legal definition or anything else. I want you to answer without talking about a personal holding company.

Q. 32. (By Mr. Pierson): Will you state your reasons for your answer in this regard? A. Well, I have a number of reasons for this opinion. I examined the income tax returns, more specifically, the income tax returns of the Maine Company and the New Jersey Company for the years 1930, '32, and '33, and I found therein certain information which seemed to me significant in indicating the nature of the activities of this company.

I find on the income tax returns in each of these years a statement to the effect that the kind of business, is the guaranteeing of securities. I think I quote it exactly from the return. So far as I have been able to discover, the guaranteeing of securities which was undertaken by this com-

pany was limited to the guarantee under the agreement or contract of 1914, which is in evidence. In other words, I have seen nothing in the information which I have gone over which would indicate that the guaranteeing of securities was an ordinary or recurring operation of the company. It was confined to that one agreement of which, of course, it is continuing in its effect through these years. So that activity of the business was essentially limited to the acquiring of securities.

I further find on examination of these income tax reports certain information in regard to the operating expenditures made by the Maine Company, and if one can draw an opinion from the amount of the expenditures it is rather apparent that the activities of this company were distinctly limited in their volume. I find, for example, compensation of officers of $50,500 in each of those years, of which $50,000 is a payment to the president, Mr. F. H. Prince, and the balance to the treasurer of the company. If the compensation paid the treasurer is any basis for judging the extent of his activity in behalf of the company, it was certainly distinctly limited.

I find that the salaries and wages paid in addition to compensation of officers as recorded is $2,000 in each of these years. This certainly would not indicate that the company was equipped with a very extensive staff carrying on operations of any kind, although it might well be sufficient to enable it to acquire and hold certain securities if it were not actively engaged in trading in them.

I find an item here for commissions of small amounts in the first two years apparently indicating some purchasing and sale of securities, but only a limited amount.

I find an item of rent of $375, if I recorded it correctly, in 1930, and a little less than $440 in 1932; and none, I believe, in 1933.

Mr. Welch: I didn't get that.

The Witness: None, I believe, in 1933.

A. (Continuing) I find that directors' fees in 1930 amounted to $90; in 1932, to $120; in 1933, to $90.

Once more, if the amount of the directors' fees can be used in any way as a measure of the number of directors' meetings, and, hence, the activities of the directors in the operations of this company, certainly their assistance and guidance and management was distinctly limited.

If I recorded these figures correctly, auditors were paid only in one year. Legal fees were none in 1930, only $50 in 1932, and something in excess of $15,000 in 1933.

Mr. Welch: We hope they won't be any higher this year.

The Witness: Of which you will obtain your fair proportion, Mr. Welch.

A. (Continuing) In other words, my analysis of the expenses of operation of this company would indicate to me that those operations were decidedly limited in character.

The Member: What do you mean by "analysis"? You have looked at the income tax returns, and you got some figures, and from those figures you have made imaginary inferences, haven't you?

The Witness: I have made certain deductions as a basis for forming an opinion. I find that the company is spending almost nothing for rent, and I find nothing is spent in wages and salaries except for $50,000 to its president, it seems to me a rather reasonable conclusion that its activities had been distinctly limited in extent and character. That perhaps is not conclusive evidence, but I think it is evidence leading towards that opinion.

A. (Continuing) I find that on examination of the income tax returns for the New Jersey Company, the consolidated income tax returns for the New Jersey Company, that Mr. Prince is shown as chairman of the board of the Transit

Company, chairman, I believe, of the Railroad Company; president of the New Jersey Company, and from the Maine return, president of the Stock Yards Company. And from other information, I understand that he was a trustee of the Central Manufacturing District trust at this time, and during the last year, I believe, part of 1932, although my recollection is not entirely clear on this, he was president of F. H. Prince & Company, Inc.

I also understand from the evidence which has been presented, that he is the principal and controlling partner in F. H. Prince & Company, a brokerage house.

Now, I find from these returns that, according to them, he spent 58 percent of his time as chairman of the Transit Company, and 42 percent of his time as chairman of the Railway Company and part of his time as president of the New Jersey Company, and time as required as president of the Stock Yards Company, and an undisclosed—I am not able to find how much time he spent on his work as trustee of the Central Manufacturing District, or F. H. Prince & Company, Inc., or F. H. Prince & Company, the brokerage house. I find that distribution of time holds for the first two years, and the last year it is shown as part time for the Transit, part time for the Railway, part time for the New Jersey, as required for the Stock Yards, the Maine Company, so that apparently, Mr. Prince,—I assume, of course that his distributions apply to his business hours,—has spent 100 percent of his business hours on the work of the Transit Company and the Railway Company and spent other time not specified on his work as an officer, trustee, and so on, of these other organizations. And I find it rather difficult to believe that from that information that he devoted very much of his time to the Maine Company. It seems to me, therefore, from my analysis of this information specifically and from whatever else I am able to have

learned from the other sources of information available, that the activity of the Maine Company was limited to being simply a holding company.

Q. 33. (By Mr. Pierson). Dr. Atkins, have you heard the testimony of Mr. Merriman with regard to the matter in which securities are bought and sold both on the organized exchanges and on the over-the-counter markets? *A.* I have.

Q. 34. Have you heard Mr. Merriman's testimony with regard to the volume of transactions in securities on the organized exchanges and on the over-the-counter market? *A.* I have.

Q. 35. What has been your experience in the respective places of organized exchange and over-the-counter market in the purchase and sale of securities? *A.* In the case of bonds as distinguished from stocks, the major portion of most types of bonds find their most ready market over-the-counter transactions and not

The Member: Is that a matter of your experience?

The Witness: Of my personal experience, sir, through five years as special liquidator of securities, during which time I was daily selling securities at all times, a long intimate experience with dealing with just that situation.

The Member: That is what you asked him? What his personal experience in selling bonds was in over the counter and on the exchanges; isn't that true?

Mr. Pierson: That is correct, Your Honor.

The Member: You are telling me how many of your transactions were over-the-counter and how many were on the stock exchanges; is that right?

The Witness: I am telling you what I found as a result of my experience. I hadn't attempted to say how I handled those particular transactions.

The Member: Well, I don't understand you. How does one man's experience tell him what the total number of

transactions are in one place or another that he doesn't have anything to do with?

Mr. Pierson: If Your Honor please, I was merely attempting to show —

The Member: I would understand it if he made some study, but his personal experience doesn't seem to me to be—

Mr. Pierson: I was merely laying a foundation to show that he had had these experiences, and I will ask him if he has made —

The Member: But I want to understand what it is that he is answering. You say that is his personal experience, and you ask, "What is your personal experience as to the relation between the sales of the exchange and over-the-counter." Now, what do you mean by that? Do you mean how many sales has he had over the counter and how many sales he has had on the exchanges, and what is the relation of one to another? Or do you mean "Have you made a study of how many sales there are on exchanges and how many sales there are on over-the-counter, irrespective of your personal participation"?

I don't know what it means.

Mr. Pierson: Well, I will reframe the question, Your Honor.

Q. 36. (By Mr. Pierson): Dr. Atkins, from your experience in selling securities in the organized exchange and in the over-the-counter market, what have you found with respect to the selling of bonds on the organized exchange and on the over-the-counter market? A. I found from my personal experience that the activity of the volume of purchase and sales of bonds is in general greater in the over-the-counter market than it is on the organized exchanges.

Q. 37. Have you made an investigation of the sales of the Maine Company, the New Jersey Company and of Railroad

Company bonds here in question during the years 1930 to 1933, inclusive, or in any prior years? A. I have made an investigation, yes.

Q. 38. What investigations have you made in that regard? A. I have made an investigation of the record of transactions in the New Jersey bonds, the New Jersey 4's and 5's, on the Boston Exchange as recorded in the weekly issues of the Commercial and Financial Chronicle, showing both volume and the prices received for the years 1929 to 1933, inclusive. I have made that weekly according to the reports in the weekly issues of the Commercial and Financial Chronicle.

The Member: We will take a short recess.

(There was a short recess taken.)

Q. 39. (By Mr. Pierson). Had you finished your answer, Doctor? A. I might add to that simply: I have made a summary of the transactions in volume only comparable to those for the years noted from 1923 to 1928, inclusive, so that my yearly summaries cover the years from 1923 to '33, inclusive. My weekly summaries from 1929 to 1933, inclusive.

Q. 40. And what is the result of your investigation in this regard? A. I found what to me appeared to be considerable activity, due consideration being given to the fact that transactions on the Boston Exchange are usually less numerous than on certain other exchanges, and also due consideration being given to the character of the bonds in question.

I find that through practically this entire period there was hardly a time when more than one week was skipped without transactions in either the 4's or 5's taking place, and that there were extended periods when transactions in one or the other of these bonds took place every week. I

find that in some weeks the volume was interestingly large. I can give those figures for some of these weeks if desired.

The figures recorded in the March 16, 1929, Commercial and Financial Chronicle showed 29 of the 5's bought and sold in that week; March 23, 14; March 30, 15; August 3, there were 31; September 7, 20; November 23, 23.

I have prepared here a table showing the results of this research, and a number of copies of it.

Mr. Pierson: If Your Honor please, I offer in evidence a schedule of the sales of the New Jersey Company bonds on the Boston Stock Exchange, which data is taken from the weekly issues of the Commercial and Financial Chronicle.

The Member: Did he say that?

The Witness: I think I did, sir.

The Member: That it came from the Commercial and Financial Chronicle?

The Witness: I believe I did, sir.

Mr. Pierson: I think that was stated. For the years 1923 to '33. That is with regard to the so-called 5's and 4's.

Mr. Welch: May I have a copy to glance at?

Mr. Pierson: Yes. Excuse me.

(Mr. Pierson hands a paperwriting to Mr. Welch.)

Mr. Welch: I would like to be permitted to say a word in objection to the exhibit, if I may.

If Your Honor please, this seems to me one of the by-ways of this case. I have been, myself, attracted down the road of many by-ways. It seems that the suggestion is made that the Maine Company might well have bought more of its subsidiaries' securities than it did buy, although the evidence is that it bought what seemed to me huge quantities of them. Now, what is the significance of this testimony? What is the sequitoir? Suppose I were to concede that the Maine Company might well have bought more securities of its subsidiaries, it in no sense follows that it has unreason-

ably accumulated its gains and profits. Indeed, if it is urged on us that we should have gone out and bought all these securities on this list, I think nothing would follow except that the gains and profits so far as accumulated would then have been in the form of these securities.

Because it seems a by-way and because it seems to me that I detect an attempt to try the case on some issue other than the true one involved, I object to this offer.

The Member: Mr. Pierson, is this top sheet supposed to be a summation of the other sheets?

Mr. Pierson: Yes, that is the summation, Your Honor. Dr. Atkins could probably—

The Member: Yes, but I want you to tell me about this, because if I am to see the significance—

Mr. Pierson: Well, I might state this, Your Honor, that indirect testimony, and this testimony is in the nature of rebuttal—there was testimony to the effect that the bonds of the New Jersey Company were held in large blocks, and that there was very little chance and very little possibility of acquiring those bonds; but that they would have if they could have.

The Member: That is Prince's testimony.

Mr. Pierson: That was Mr. Prince's testimony.

The Member: That is right. What has this got to do with that?

Mr. Pierson: We are offering this in rebuttal, Your Honor.

The Member: Well, I know, but I say how does it show anything?

Mr. Pierson: It shows—

The Member: He has testified that he couldn't get some bonds. Now, are you intending to show that he could have gotten these bonds and didn't?

Mr. Pierson: That if he had wanted to go into the market to acquire these bonds, he could have done so.

The Member: I mean, you are going to show that these bonds—

Mr. Pierson: Were available.

The Member: Were sold to someone else and not to him, not to his company?

Mr. Pierson: But that they were available and could have been purchased.

The Member: Well, are you going to connect it up with something else; are you?

Mr. Pierson: Yes, Your Honor.

The Member: Well, I think I will wait until you do before I permit it to be received. It seems to me that the mere fact that the bonds were bought and sold on the Boston Stock Exchange or to the extent to which they were bought and sold without more is not connected up with the issue in this case, but I am willing to believe that it may be evidence by which it can be connected up, and if and when it is I will entertain a motion to receive it again.

Mr. Pierson: Excuse me a minute.

(Counsel for Respondent confer.)

Mr. Pierson: I will follow that with some further questions, Your Honor, and then I shall make the offer.

The Member: Very well.

Q. 41. (By Mr. Pierson). Had you completed your answer in that regard, Dr. Atkins? A. I must confess that I have lost track of what I said last. Perhaps the Reporter can refresh my memory.

The Member: The last thing you said was that you had prepared a statement of the transactions that occurred on the Boston Stock Exchange, and then this statement was produced.

The Witness: Yes, I think I have completed it.

Q. 42. (By Mr. Pierson). You have completed it to that extent? A. To that extent, yes.

Q. 43. Now, in connection with what you have just testified to, Dr. Atkins, would your investigation indicate that all or a major part of the New Jersey Company bonds were sold on the Boston Stock Exchange? A. My investigation very definitely points to the fact that not all the sales took place on the Boston Stock Exchange, because I found quotations for these securities in the National Bond Quotation Book, and it has been my personal experience, as I stated before, that most types of bonds, and, more specifically, bonds of this sort usually sell in substantially larger volume over-the-counter than they do on the organized exchanges.

Q. 44. Well, what are the reasons for your statement in that regard, Doctor? A. Going back to my personal experience for five years, I was charged with this duty of liquidating the securities, more specifically, bonds owned by insolvent national banks. Those bonds, as I indicated, were shipped into the Federal Reserve Bank in New York to be held in physical safekeeping to be delivered upon my order, and the proceeds collected and remitted to the Comptroller of the Currency. It was my task to find a market for these bonds and determine the conditions of sale. In so doing I established contact with a large number of houses in all parts of the country. Perhaps I should better say a large number of houses in all parts of the country established contact with me, because when it became known, as it did, that this office had been opened for the purpose at hand, brokerage houses, dealers in securities and even individuals came in seeking to buy securities from me.

In determining the sale it was essential, of course, for me to know whether the sale was to take place on a recognized exchange or whether it was to take place over-the-counter. The terms and bases of such sales were predicated

in part upon where the sale took place, and it was on this experience, extending over this five-year period in particular, although the same type of experience was mine when I was with Ames, Emerich & Company, which leads me to state that the major volume of the sales of bonds of this type are made over the counter and not on the organized exchange.

Q. 44½. In connection with your investigation, what did that disclose as to transactions in the bonds of the Maine Company and the Railroad, or the Elevated Company? *A.* The two bonds you have just mentioned are not listed, so far as I know, and hence the transactions in them took place exclusively in the over-the-counter market, and my information in regard to them, therefore, was obtained from this National Quotation Bond Service.

Q. 45. Dr. Atkins, I hand you a book entitled "National Corporation Bonds and Summary," and ask you to state whether or not that is the service to which you have been referring. *A.* That is the service to which I have been referring. This is one of the semi-annual volumes, the issue of January, 1932, which covers the six months' period, the last six months of 1931.

Q. 46. And did you find any quotations therein with regard to the bonds just mentioned? *A.* I have.

Q. 47. Will you state what they are, please?

Mr. Welch: Just a moment. I am quick, if Your Honor please, to recognize things like Poor's or the Financial Chronicle. Perhaps I might be better informed. I know nothing about this book, and I have no confidence in it.

Mr. Pierson: If Your Honor please, I would like you to examine this type of book.

The Member: Well, I do not think this type of book helps any. I do not know any more about it than he does.

Mr. Pierson: I will ask the witness.

Q. 48. (By Mr. Pierson): Will you state what this book contains, from your experience in its use, Dr. Atkins? A. This book I have in my hand is the semi-annual summary of the records covering the securities recorded herein, which were first summarized in monthly summary volumes. The monthly summary volumes are, in turn, a summary of the daily sheets which are published by the National Quotation Bureau, which is its exact title. These daily sheets, they are mimeographed, they are roughly that size (indicating)—

Q. 49. When you say "that size" you are referring to the full— A. Size over the square surface of this. Usually there are anywhere from three or four to eight or ten or more of these published each day and are stapled together, a single line for each entry therein.

The Member: Are they the ones that were referred to in a previous witness' testimony?

The Witness: They are the same ones referred to by Mr. Merriman.

The Member: They deal only with the bid and asked quotations?

The Witness: Yes, sir.

The Member: And do not purport to show the actual sales or the prices; is that correct?

The Witness: That is right, sir.

The Member: And that is what this red book is?

The Witness: This is the semi-annual summary which is made up indirectly from the daily sheets through the monthly summaries.

Now, Mr. Welch has indicated that he is not familiar with this volume. I am sure that if he would ask any dealer or any broker that makes a practice of buying and selling unlisted securities he would find that they are well acquainted with this service. It is indispensable to anyone who is ac-

tively engaged in buying and selling over-the-counter bonds. I won't say over-the-counter securities because the same kind of book is prepared for stocks. This is the bond book and not the stock book.

Mr. Merriman, I think, testified yesterday that these sheets are prepared and distributed to subscribers to this service daily, and from those sheets it is possible to locate at least a substantial number of the houses which are currently interested in either the purchase or sale, or both, of securities listed therein.

I can speak from very intimate experience with this service, because it was my daily companion for five years while I was engaged in selling these bonds. My trainer had it under his hand at all times, and we went over it planning the program for the day. So I had long and intimate experience with the material which is contained in this volume. It is, as Your Honor just stated, a record of the bid and asked prices. It is not a record of the actual sales; but practical experience with these sheets and with this volume has established in my mind very definitely the fact that it is possible to get a rather accurate idea of the volume of transactions, not the exact volume, but a relative idea, which is relatively exact, of the volume of transactions by seeing the number of quotations, the number of houses interested in the security, and the closeness of the bid and asked prices recorded therein.

So far as I know, there is no official record, or unofficial record, of the volume of transactions in unlisted securities published, and this, as far as I know, is the best, if not the only, means of obtaining a reasonably good idea of both the prices and of the activity.

The Member: Mr. Pierson, has your research in the law books disclosed any expression in decisions that throws any

light upon the recognition of the authoritativeness of this publication?

Mr. Pierson: It has not, Your Honor. I have never—

The Member: This is a new place that we are now asked to look for the authoritative data upon bid and asked quotations. I have never heard of it before in any case before the Board, and I want to know. If it is brand new, it seems to me that it takes more than an individual witness' experience in looking at it to test its authoritativeness.

Mr. Pierson: Well, in the light of what the witness has just stated, Your Honor, as to the use which he has made of it as an authority or as a source for the bid and asked price on unlisted bonds, I feel that it has its place as an authority.

The Member: Is that the way you contend to establish an authority, by having one witness say that "I think that if you ask all the people that deal with it, they would agree that it is worth looking at"?

Mr. Pierson: Well, I believe Mr. Merriman, our first witness this morning, testified that he secured—rather, yesterday, testified that he also secured data from that source.

The Member: Oh, yes. I suppose all your witnesses have. I am talking now formally. I have got to deal with this as a matter of evidence and not as a matter of my personal credulousness or incredulousness as to what certain witnesses have to say. If it is authoritative, I want to know why it is authoritative; if it is not authoritative, I do not want to recognize it.

Mr. Pierson: Well, in regard to that, Your Honor, this witness has testified as to his large experience, the use of this book, and the large amount of bonds.

The Member: Yes, but his experience may be wrong. His experience may all have been up the wrong tree. You know that no matter who a witness is, and no matter how respect

able he may be, his say-so does not make a book authoritative. The fact that he likes to read this book rather than some other source in order to ascertain some data does not establish it as an authoritative source for an official proceeding such as this is. I have got to be safe about this. I have got to be assured about it. The place where I look for assurance is amongst counsel who are offering it.

Mr. Pierson: Do I understand that my opponent is still raising the question as to whether or not this is official and recognized?

Mr. Welch: I must give you that appearance.

Mr. Pierson: Well, it is on that basis, Your Honor, that I have attempted to show that this is an official document which is recognized among brokers, to which they turn for official information as regards the bid and asked prices on bonds, unlisted bonds, sold over-the-counter.

The Member: Well, I will sustain the objection.

Mr. Pierson: Exception?

The Member: Yes. I wonder what the Securities and Exchange Commission have to say about this. According to the newspapers, they have been investigating over-the-counter transactions now for some time. Is there any publication which would indicate that this is an authoritative publication?

Mr. Pierson: I do not know at this time, Your Honor, but I think it will be possible to find out from the Interstate Commerce Commission.

The Member: Interstate Commerce Commission?

Mr. Pierson: No. I do not mean the Interstate Commerce Commission. I mean the Securities and Exchange Commission.

7,750. (By Mr. Pierson). Dr. Atkins, from your experience in buying and selling bonds, would you say that it is possible to buy and sell substantial quantities of bonds with-

out unduly affecting the market price for such bonds? A. Yes, sir.

Mr. Welch: Well, I object to that, Your Honor. That might be true of 7,000 bonds and untrue of one bond.

The Member: I will sustain the objection.

Mr. Pierson: I will reframe the question.

Q. 51. (By Mr. Pierson). From your investigation and experience, Dr. Atkins, would you say that you could sell bonds of a par value of, we will say, a million dollars without unduly affecting the market price for such bonds?

Mr. Welch: Objection.

The Member: Sustained.

Q. 52. (By Mr. Pierson). Dr. Atkins, what effect would it have on the market if substantial quantities of bonds were sold—I will change that. What effect would it have on the market if, for instance, a million dollars worth of bonds were sold?

Mr. Welch: Objection.

The Member: Overruled.

A. My answer to that must necessarily be predicated upon the nature and, more specifically, the particular issue of bonds. There are some issues of bonds of which a million could be sold without causing even a ripple on the market at one time, and there are others which it would be rather difficult to sell all at one time.

Another condition which would have an important influence would be whether it is imperative to sell those bonds within a given length of time, or whether it is possible to withhold the sale of those bonds until the market was obtained which was satisfactory. It has been my experience with a large portion of the bonds that if you are not under the compulsion of immediate sale, and the market conditions are reasonably satisfactory, they can be sold without seriously disturbing the market.

I speak much more from my personal experience as special liquidator, where I dealt at times in quite substantial volumes of certain issues of bonds, and obviously I wished to get the best possible market for them. I found that it was possible when the brokers and dealers learned that I was under no compulsion to sell at a particular time, but could withhold that sale until I obtained a market satisfactory to myself, that I was able to move substantial blocks of bonds without depressing the market; and I have observed with Ames, Emerich & Company an accumulation of substantial blocks of bonds under analogous conditions. That is——

The Member: There isn't anything expert about that, is there? Isn't it perfectly common sense, whether you want to buy a house or bonds or anything else, if you are in a position where you have to be patient, you can probably get a better price than if you were in a position where you are in a hurry to consummate the transaction at once? Is there anything expert about that?

The Witness: Why, I do not know exactly how you use the term "expert" there, Your Honor.

The Member: Well, I mean to say, you do not have to sell 25 million dollars worth of securities to get that view, do you, to be aware that that is true?

The Witness: Well, the market is constantly confronted with problems of that kind.

The Member: If you are slow about it and take it easy you can get a more satisfactory market than if you are in a hurry; that is all it comes to, isn't it?

The Witness: Perhaps.

The Member: I do not see, Mr. Pierson, that this leads anywhere. We are taking an awful lot of time getting information that does not help us in either the findings of facts or decision of this case, and there comes a time when, it seems to me, I ought to call a halt.

Mr. Pierson: If Your Honor please, in the presentation of the case I felt that in rebuttal of the testimony which came in from the Petitioner's witnesses as to the availability and whether he could acquire these bonds, it was proper at this place in the case to show that you can acquire bonds on the market through brokers.

The Member: Well, I suppose everybody would adopt that as true, that if the market record of sales indicates that there were sales, that would indicate that there were purchases, and from that I suppose you might infer whether or not, if somebody else bought, whether or not these people could buy. That is a matter of inference, I suppose. But we have got direct evidence that these people tried to buy and were unable to buy. Now, is it enough to overcome that to prove merely that there were sales upon the open market? It may be that one could admit that there were sales upon the open market, and still have it be true, as a matter of fact, that these people tried to buy and were unable to buy. Now, there are all sorts of conditions and circumstances besides a mere market quotation.

Mr. Pierson: Well, as we view it, Your Honor, if they are listed on the Exchange, certainly you can go into the Exchange and buy them.

The Member: Very well. If there is any inference to be drawn, isn't it an inference that the Board must draw in making the findings of fact, and not an inference of so-called expert witnesses? All you need is the fact that there were purchases and sales upon the open market. Now, then, argument is to be made from that, it seems to me, not as an argument by a witness on the witness stand as to what he thinks about it, but an argument made in brief as to what inferences the trier of the case should draw from those facts.

Mr. Pierson: Well, in addition to that, Your Honor, the

Respondent is also attempting to show that in these over-the-counter transactions the method by which he, through his own personal knowledge and experience, found that you can acquire or sell bonds in the over-the-counter market, that is aside from those that are listed on the Exchange; that is, as we view it, it is not only the ones that are actually sold on the Exchange—

The Member: Actually sold?

Mr. Pierson: Actually sold,—that in his experience he has been able to acquire or sell bonds in the over-the-counter market in large numbers, which would indicate, as it seems to us, that these bonds could have been purchased or acquired in that manner.

The Member: Well, I don't know. I should think we should go so far as to show that there were purchases and sales of these bonds, but I don't care whether they are over-the-counter or on the Exchange or anywhere else. Those are the facts, I should think, that you should put in, and the inferences are to be drawn from those facts, not inferences as to whether some one had experience with a thousand bonds, or ten thousand, or 250 million. Those are inferences that must be drawn by the Board.

I do not understand yet the theory upon which this case is all being tried and what this evidence has to do with it. I cannot believe at the moment that Congress intended that this statute should be applied in this way. I do not believe the Government, when it imposes or determines a deficiency under section 104, does it because experts have come to it and said that this corporation or this taxpayer has not acted in accordance with the way the market would indicate that it should have.

Mr. Pierson: Well, in that connection, if Your Honor please, I think that it is perfectly permissible to introduce expert testimony in rebuttal where you are faced with testi-

mony here, where it has been testified by Mr. Prince that he would have bought these securities in large blocks but he could not get them.

The Member: Well, I think you are right. You are right in the introduction of testimony that is a matter of fact, of evidence, and not the introduction of somebody's personal view as to whether this fellow was wise or unwise in places where he went to seek to buy these bonds. You can put in all the testimony you want as to what sales occurred within these taxable years, but these particular bonds, from which you may ask the Board to draw all its inferences as to whether or not we should believe him when he says that he tried and could not buy, certainly his say so as to that is not the last word. We do not have to accept that. We have got to have some factual proof, it seems to me.

Mr. Pierson: If Your Honor please, I have probably not stated it clearly, but it seems to me that it is not opinion testimony necessarily but it runs to this: Mr. Prince testified that these outstanding shares of the New Jersey Company were closely held in large blocks—bonds, I should say, and he would have gotten them if he could.

Now, it seems to me that it is correct to have a witness who is thoroughly familiar with market conditions, and who has dealt in bonds, such as the witness here has dealt in, to show that that is not the correct statement. That is in the nature of rebuttal.

The Member: Well, it is not for the witness to show that that is not a correct statement; it is for you to put in proof from which we may infer that it is not a correct statement. Now, his statement about it is of no consequence at all as to the correctness or incorrectness of the witness' statement of facts that the other witness has put in. What would be and what is of very substantial consequence is what are the facts which show that the witness who testified on the other

side has made a misstatement. In other words, I am not going to stack up the integrity of the witnesses on the one side and the integrity of the witnesses on the other and say, "I like these fellows better than I like the other fellows and therefore I will take what they say." I like to be able to weigh these facts in accordance with what the law is, their evidentiary value, their probative value; and while I may employ this witness to give me some advice if I were to buy some bonds, I do not think that means that this man's mere say-so constitutes evidence with which to rebut the factual data that is in on the other side.

Mr. Pierson: But I think, Your Honor, that he has qualified here to testify as to whether or not under conditions such as this you can acquire bonds.

The Member: I should disagree with that. If you make that proffer I should think I would exclude it, if that is what this witness is being called for to testify about.

Mr. Pierson: If Your Honor please, I make the proffer that this witness will testify with regard to his handling and experience in dealing in large blocks, large quantities of bonds; and that he will further testify that by the handling of large blocks of bonds that he could buy them and sell them on the market without affecting the market price to any degree; that large blocks of—

The Member: That is already in, isn't it, that testimony?

Mr. Pierson: I think he has testified to that extent. I don't know just how far. I have forgotten the record.

The Member: I don't have to rule on that.

Mr. Pierson: That where the bonds of the New Jersey Company were held closely in large blocks by comparatively few holders, that they could still have been purchased by the Maine Company.

The Member: You mean he is going to testify to that cate-

gorically without testifying that there was an attempt made to do so which actually and concretely failed?

Mr. Pierson: Yes, Your Honor, from his experience, that is, bonds of this type and of the Maine Company's bonds.

The Member: All right. I will exclude that, but I won't exclude testimony of an effort made actually to secure these bonds in any large numbers, a real offer, a genuine offer, and a failure to get a taker, if you have evidence like that.

Mr. Pierson: That he will testify that he has had experience in bond dealings where large blocks are held.

The Member: You may put that in.

Mr. Pierson: And that in the light of his experience, his opinion as to whether it would have been possible to purchase substantial quantities of the bonds of the New Jersey Company.

The Member: I will exclude that. I exclude that because I think the evidence of the possibility of purchasing must be evidence of fact and not by the opinion by any one individual.

Mr. Welch: Could I say what is in my mind?

The Member: If you have evidence of his attempt to do so and the failure of the attempt, I will hear the evidence showing that attempt.

Mr. Welch: If Your Honor please, I was considering admitting the proffer in lieu of the actual testimony because of the fact that I consider this such a by-way of the case that it is of little importance any way, and I would like to consider with my assistant as to whether I want any exception outstanding in this by-way of the case.

May I ask, Mr. Pierson, if you would be content to take your proffer of what the witness would testify to as equal to his testimony if I waive objection to it?

Mr. Pierson: No, I would desire to further question the witness in that regard.

Mr. Welch: In that event, having made that rather generous offer, I think I will stand on Your Honor's ruling.

The Member: As I understand, you would not have objected if Mr. Pierson's statement as to his proffer were to be regarded as the evidence?

Mr. Welch: Right.

The Member: But that you do object to the questioning of the witness along the lines that the proffer indicates?

Mr. Welch: Well, it may seem curious—

The Member: To the extent that I have excluded it?

Mr. Welch: We have taken so much time on it, and I consider it so immaterial, that I thought I would be generous to my brother, accept his proffer as evidence and move on to something that I conceive really to have something to do with the case.

The Member: I think that has gone along so long a time in this case that it is hard to know when the door ought to be closed. I confess there have been several days of testimony the significance of which I have grave doubts of because it seems to me that they get a very short distance, if any distance at all, towards helping me to decide the issue in this case under the statute. But I assume that when the Government offers testimony it is because it has had a tremendous amount of experience in this type of case; that it has thought very carefully of the type of evidence that it regards as necessary in order to bring it within the statute, and, therefore, I am very timorous about excluding that, but I confess that after a long period of time in trying to establish a connection between the primary and central issue and the tangential evidence that is offered, I get tired, and I get tired of making that long arc of connection, and perhaps I am getting a little bit impatient about it, but I fail to see the relevancy or the importance of a great deal of the testimony that has gone in along this line.

I may say that it is equally true as to the Petitioner's case.

Mr. Welch: I am aware of that.

The Member: I am also very substantially obstructed in doing what seems to be the reasonable thing to do by reason of the fact that the Board has established a precedent in the acceptance of testimony which has affected the ultimate result in some of these cases so I don't feel in any assured position that I can exclude testimony in this case which has been received in cases which are similar. What I fear is there has come to be established a convention of trying this type of case by a remote evidence process which I doubt will be satisfactory to anybody. We are going further and further afield, it seems to me, in the trial of this type of case.

Mr. Welch: Would Your Honor permit me to say, however, that it would take immense courage as counsel for a taxpayer to stop short of the line of proof that I felt that I should offer? I think Your Honor is right but it takes tremendous courage to try the case on less than the two issues that Your Honor and I both think are not really in the case.

The Member: Well, apparently, it does. It takes more courage than I have to exclude the evidence, and it apparently has happened frequently enough to indicate that it takes more courage than most counsel have in these cases, because there have been a number of them.

I wish there was some way which could be devised whereby from an authoritative source we could get an expression whereby we would know what the reasonable confines of evidence are in an issue of this kind.

I think this is a good time to stop, so we will suspend until 10 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p. m., February 7, 1939, the hearing in the above-entitled case was adjourned.)

[Title omitted.]

EIGHTH DAY.

REPORTER'S MINUTES.

[Filed February 9, 1939.]

Hearing at Washington, D. C., on the 8th day of February, 1939, at 10 o'clock a.m.

The hearing in the above-entitled proceeding was resumed on this the 8th day of February, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted.)

PROCEEDINGS.

Mr. Pierson: If Your Honor please, at this time I have spoken to Counsel for the Petitioner with respect to adjourning with the Witness Atkins just for a few moments and to put on Mr. Fletcher who will clear up this matter with regard to the National Corporation Bond Summaries to which reference was made yesterday. There will be just a few questions just to show its authenticity.

The Member: Very well.

MR. JOHN L. FLETCHER

called as a witness by and on behalf of the Respondent, and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Pierson). Will you state your name for the record? A. John L. Fletcher.

Q. 2. Where do you live? A. Hackensack, N. J.

Q. 3. What is your position, Mr. Fletcher? A. Secretary of the National Quotations Bureau.

Q. 4. How long have you held this position? A. Since 1913.

Q. 5. What is the business of the National Quotations Bureau? A. Compiling and publishing quotations on over the-counter securities.

Q. 6. How do you obtain the quotations? A. Directly from the dealers by telephone, teletype, hand delivery in New York, and mail.

Q. 7. What publication or publications does the National Quotations Bureau issue? A. Three monthly services and a daily service.

Q. 8. Will you describe what the daily service is and what the monthly service is? A. The daily service is a mimeographed list of all types of unlisted securities arranged alphabetically, subdivided by type of security, showing the name of the broker, his address, and telephone number, and the prices at which he is bidding or offering securities.

Q. 9. Mr. Fletcher, do you make a summary of these daily and monthly publications? A. Our monthly books is a summary of our daily sheets.

Q. 10. I don't know whether you answered this or not, Mr. Fletcher. Will you explain the sources of the data contained in the summary sheets to which you refer? A. All quotations are obtained directly from the brokers.

Q. 11. To whom are these publications distributed? A. To dealers in over-the-counter securities.

Q. 12. And how widely are they distributed? A. The principal dealers throughout the country use our services.

Q. 13. I hand you a book entitled "National Corporation Bond Summary," and ask you if that is one of the books which you publish? A. It is.

Q. 14. And that is the one to which you refer as the summary? A. That is the summary.

Q. 15. Mr. Fletcher, I will ask you whether these summaries are used as an authoritative source of information for over-the-counter transactions in bonds by brokers. I believe you stated—

Mr. Welch: Objection.

The Member: Just a moment. Have you finished the question?

Mr. Pierson: I was going further to add—

Mr. Welch: I beg your pardon.

Mr. Pierson: I was going further to add that I believe the witness had stated that the data compiled was used by brokers.

The Member: Now, what is the question? Read it, please, Mr. Reporter.

(Last question read.)

The Member: I sustain the objection.

Q. 16. (By Mr. Pierson). Mr. Fletcher, have you at any time testified in court relative to over-the-counter quotations in bonds? A. Yes.

Mr. Welch: Objection.

The Member: Overruled.

Q. 17. (By Mr. Pierson). In the course of your testimony in such cases have you referred to the data contained in this National Corporation Bond Summary? A. Yes, I have.

Q. 18. And that is relative to over-the-counter quotations in bonds? A. Yes.

Q. 19. Has this summary been accepted in evidence by the court in such cases?

Mr. Welch: Objection.

The Member: Sustained.

Mr. Pierson: Exception, Your Honor.

The Member: I do not know what your theory is. Is it

that because some courts have accepted it, as this witness says, that makes it authoritative?

Mr. Pierson: I certainly think it does, Your Honor. This witness has testified in court and used this publication, and it was accepted.

The Member: Well, I just asked you what the theory was, and you stated it; so there is no point in hesitating. I made my ruling.

Q. 20. (By Mr. Pierson). In how many cases have you testified, Mr. Fletcher? A. Approximately twenty-five.

Q. 21. And you have used this National Corporation Bond Summary in regard to your testimony in those cases? A. Either that or our daily sheets or our stock summary.

Q. 22. Before what courts have you testified with respect to the data contained in this National Corporation Bond Summary? A. Supreme Court of New York, the Circuit Court of New York, Surrogate's Court—

The Member: What Circuit Court of New York?

The Witness: May I refer to my sheet, please?

(The witness refers to a memorandum.)

The Witness: I should have said the General Sessions Court, the Surrogate's Court of Suffolk County, New York, the Surrogate's Court of Nassau County, New York, the Atlantic County Circuit Court are some of them.

The Member: The Atlantic County Circuit Court?

The Witness: Yes, sir.

The Member: Where is that?

The Witness: Atlantic City.

The Member: Oh.

Mr. Pierson: I now wish to make a proffer for the record of the quotations contained in the National Corporation Bond Summary. It runs from January, 1932, to July, 1932, Volume 36, relative to the bid and asked prices on the bonds of the Chicago Junction Railway Company, which bonds are

stated therein as the Chicago Junction Railway and Union Stock Yards Company 4's of 1940 and the 5's of 1940, and also the Chicago Stock Yards Company collateral trust 5's of October 1, 1961. This proffer is made as being indicative of the determination of the prices at which said bonds were obtainable on the over-the-counter market.

The Member: You are offering the book in evidence, are you? Is that the point?

Mr. Pierson: If I may do that, Your Honor, and then have such pages therein photostated and withdraw them.

The Member: Is there any objection?

Mr. Welch: Just a moment, if Your Honor please. Maybe we had better look at the thing.

(The volume referred to was handed to Mr. Welch.)

Mr. Welch: I have reached the conclusion that my brothers may use it for whatever probative force it may have. I don't object to it.

Mr. Pierson: That is, as I understand you, you don't object to the offering of this book in evidence?

Mr. Welch: I do not, the portion that you offered.

Mr. Pierson: Yes.

The Member: Now, if I understand you correctly, from your last statement, you are not going to offer the whole book but you are going to offer photostatic copies of the pages that you want in?

Mr. Pierson: That is correct, Your Honor. I offer in evidence pages 538 and 539, and page 555 of the National Corporation Bond Summary for January, '32, to July, 1932, Volume 36.

The Member: That will be three sheets, will it not, three photostatic sheets?

Mr. Pierson: That is correct, Your Honor.

The Member: And the Petitioner, as I understand, has no objection to the receipt of them in evidence?

Mr. Welch: That is correct.

The Member: Therefore, we won't mark anything now, because we haven't got anything, but we will hold the Exhibit T raised to the fourth power for this photostatic triple page exhibit, which, as I understand, will be here tomorrow morning, or not later than tomorrow morning?

Mr. Pierson: Yes, Your Honor.

The Member: This afternoon, if possible?

Mr. Pierson: If possible.

The Member: Now, is there anything more that you need from this witness?

Mr. Pierson: No. That is all I have except one more offer.

The Member: Have you anything to cross-examine this witness about?

Mr. Welch: I would like to consider for a moment.

The Member: Make your offer of the next exhibit, then.

Mr. Pierson: I offer in evidence page 523 and page 539, and page 540 of the National Corporation Bond Summary from July, 1931, to January, 1932, Volume 35.

The Member: That also will be a three-page exhibit?

Mr. Pierson: Three pages.

The Member: Photostatic copies?

Mr. Pierson: Yes, Your Honor.

The Member: That is Exhibit four times U.

Mr. Welch: Just one or two questions.

Cross-Examination.

X-Q. 23. (By Mr. Welch). May I ask your name again, sir? *A.* Fletcher.

X-Q. 24. Referring to all quotations in this book, as I understand it, it gives or quotes bid and asked prices for bonds, giving the name of the broker bidding or asking, his address and telephone number; is that right? *A.* That applies more

to our daily sheets. This gives the same information without the address and telephone number.

X-Q. 25. And your daily sheets come out, I assume, the next day, after you learn that some brokers are either buying or offering? *A.* We send them out that night, yes.

X-Q. 26. And you do not report any actual sales? *A.* No, sir.

X-Q. 27. But if I understand you correctly, by looking at the bid and asked prices you think you can make a highly intelligent guess that some sale took place somewhere between the bid and asked price, can't you? *A.* Those prices indicate the prices at which transactions would take place.

X-Q. 28. Yes. My point is this: Anyone as skilled as you could make a highly intelligent guess that some sale took place between the bid and the asked figures, could he not? *A.* Those indicate the prices at which sales would take place.

X-Q. 29. Well, I just want you to answer my question "yes" or "no." It is possible to make a highly intelligent guess that some sale took place at some figure between the bid price and the asked price, isn't it? *A.* That should be the indication of the bid and asked prices.

X-Q. 30. Yes; and also it is possible to make a highly intelligent guess as to the quantity sold, isn't it? *A.* No, sir.

X-Q. 31. You can't even make an intelligent guess as to the quantity sold? *A.* No; I will say not.

Mr. Welch: That is all.

Q. 32. (By the Member). Let me ask you this: You say that you make up these bid and asked quotations from the information which is sent to you by brokers; that is correct, isn't it? *A.* Yes, sir.

Q. 33. What is your arrangement with the broker which makes it reliable that he has sent you all of the bids and asked quotations which he has received each day? *A.* He does not necessarily send us all of his orders.

Q. 34. What does he send you? *A.* He can—he has the privilege of listing ten securities on our sheets for the day with his subscription. He can take out additional subscriptions. He naturally picks out certain securities in which he has orders, listing them in our service.

Q. 35. Now, do you list only the quotations which are sent to you by subscribing brokers? *A.* That is the case with the daily sheets but not with our summaries.

Q. 36. You mean it is not the case with the red book that is before you, for the month? *A.* That is right. The red book contains additional quotations which do not appear on our daily sheets. Brokers who are not subscribers to our daily sheets send us quotations which appear in the summaries.

Q. 37. You mean it just happens that voluntarily they do? *A.* Well, they wish their names to appear under certain securities.

Q. 38. But have you any information about whether there are quotations of brokers which do not appear in this publication? *A.* I don't quite understand your question, but I can assume that—I do assume that a broker may receive orders every day which he does not report to us.

Q. 39. Is it fair to assume that there are some brokers, many or few, as the case may be, who send you no information for your publication? *A.* Yes. There are certain dealers who simply have the privilege of receiving our sheets and not the privilege of listing their own quotations.

Q. 40. Well, I want to know this: Is it true that there are brokers throughout the United States who deal in over-the-counter transactions and who have bids or asks about which you, because of your limitation of your arrangement, would know nothing? *A.* That is true.

Q. 41. And is it true that there are brokers who send

you no information of their bid and asked quotations? A. It is true.

Q. 42. So that your publication does not purport to be a complete statement of the bid and asked quotations of all brokers in the United States in over-the-counter business? A. It could not claim to be complete, no. I don't believe it would be possible to get all such information. I might say that we get our sheets in New York every day, in Chicago every day, and in San Francisco every day; and in that way we fairly cover the country; and we know that it is the most complete service on over-the-counter securities that is published.

Q. 43. Now, is this true, that the primary usefulness of this service, the demand that you hope to supply by publishing this, is to give brokers information which will enable them to complete the other side of the transaction that they are in a position to start, so that if they have a demand price this information will give them a possible purchaser, and if they have an offer price this information will give them a possible seller. Is that the primary function of your publication? A. I would say so. I might say the primary function is to furnish a guide to dealers as to the current markets on many thousands of unlisted securities.

The Member: All right.

Mr. Pierson? That is all, Mr. Fletcher. Thank you.

The Member: Just one more question, Mr. Fletcher.

Q. 44. (By the Member). Is your publication registered with any organizations or any place such as the New York Stock Exchange, or anything of that sort, where it would be officially recognized as giving the information authoritatively and reliably, as it purports to give, or is it merely used by brokers? A. It is merely used by brokers. We couldn't belong to the New York Stock Exchange.

Q. 45. No. Is there any way that it might— A. We are

members of the New York Security Dealers Association, but we have no connection with the New York Stock Exchange, because our publication is on unlisted securities.

Q. 46. New York Security Dealers Association? A. Yes, sir.

Q. 47. Is that an organization of all dealers in stocks and bonds in New York City? A. Probably not all of them but a great majority of the largest dealers.

The Member: All right.

(Witness excused.)

Mr. Pierson: Dr. Atkins, will you resume the stand.

DR. PAUL M. ATKINS

having heretofore been sworn, was recalled to the stand, and was examined and testified as follows:

Mr. Pierson: Your Honor, just to save some time, if I may confer with Counsel for a moment.

The Member: Yes.

(Pause.)

Mr. Pierson: If Your Honor please, I now offer in evidence the sales of the New Jersey Company bonds on the Boston Stock Exchange for the years 1929 to 1933, together with a summary sheet attached thereto, which data is taken from the weekly issues of the Commercial and Financial Chronicle. I understand now that Mr. Welch, my opponent, has no objection to that offer.

The Member: Is that the same paper the offer of which was deferred yesterday?

Mr. Pierson: That is correct, Your Honor.

The Member: It is received.

Mr. Pierson: If Your Honor please, on the front summary sheet there is also contained summaries of the years 1923 to 1938, inclusive, and I am not offering those summaries inasmuch as there is no supporting data or schedule to support that.

The Member: Can the years which are excluded be stricken through so that physically it will appear that they are not to be regarded as a part of the exhibit?

Mr. Pierson: If Your Honor will permit it, I will have this summary sheet retyped eliminating those years therefrom.

The Member: Well, that is preferable.

Mr. Welch: If Your Honor please, we haven't checked it, but it is inconceivable to me that there can be any errors in it, and I think Mr. Pierson will be quick to say that if I find an error it would be a typographical one and it could be corrected.

Mr. Pierson: That is correct.

The Member: You are offering something which you say you are not going to put in evidence. I am talking about this particular sheet. He says he is going to offer the sheet retyped, and eliminate from it the part that he is now proposing to delete. I should think the thing to do would be to defer your offer a little further until you get the sheet that you want to put in evidence.

Mr. Pierson: All right, Your Honor.

Direct Examination (Continued).

Q. 53. (By Mr. Pierson). Dr. Atkins, have you had experience in bond dealings where large blocks were held? *A.* I have.

Q. 54. And closely held? *A.* In some cases, yes.

Q. 55. What has been your experience as to the possibility of acquiring such bonds so held by one who desired to buy them? *A.* My experience has been that it is frequently possible to obtain such blocks of securities. Where a substantial block of securities is held by a single party, usually they are held on what I perhaps could most succinctly term on a strictly investment basis. In other words, they are not held

for sentimental reasons, and are for sale, therefore, if the holder of those securities can obtain a price which he feels is satisfactory. Usually he is eager to get the maximum return commensurate with the risk which he has to assume. In other words, if he can obtain a price fractionally above what he feels he can buy other bonds or other securities carrying the same approximate risk at which he can obtain possibly a lower price for some reason, he will be willing to sell the bonds or the securities which he holds in order to be able to reinvest his funds in others.

Q. 56. Dr. Atkins, in the light of your examination of the stipulation with the exhibits attached thereto, the exhibits introduced by both parties at this hearing, and the other evidence of record in the case, and your special training and experience, have you formed an opinion as to the fair market value of the common stock of New Jersey Company owned by the Maine Company as of December 31, 1930, December 31, 1932, and December 31, 1933? *A.* I have.

Q. 57. Consider for the purpose of your response to the term "fair market value" to mean the price at which a seller willing to sell at a fair price and a buyer willing to buy at a fair price, both having reasonable knowledge of the facts, will trade. *A.* I have.

Q. 58. What is your opinion in that regard? *A.* My opinion is that on December 31, 1930, I would value the stock that you have described, on the basis that you have described, in a round figure of $26,600,000;

On December 31, 1932, I would value this same stock on the same basis at $20,700,000;

On December 31, 1933, the same described stock in question, at $22,600,000.

Q. 59. And when you say "value," Dr. Atkins, you mean fair market value? *A.* I mean the fair market value as you have described it.

Q. 60. Will you state your reasons for your opinion in this regard? A. My reasons for these statements are of two general types. One is based on a study, consideration of the various facts in regard to this company, and the related subsidiary and related companies, the information that has been presented in the stipulation and the exhibits attached thereto, and certain exhibits presented in evidence admitted in this case. And in the second place, as a background for forming this opinion, I have given consideration to general economic and business conditions, and the market for securities of other companies which were currently sold on or about these dates in the open market. I have given consideration to the relative position of bonds and stocks as represented by their returns, explanation of which was given yesterday in some detail by Mr. Merriman. And it is on the basis of consideration of these various factors that I have reached the conclusions which I have stated.

Q. 61. Dr. Atkins, you have either heard or read the testimony to the effect that a large accumulation of gains and profits had to be kept by the Maine Company because of the necessity to meet the financial obligation of the New Jersey Company in 1940. A. Yes, sir.

Q. 62. In the light of your experience do you consider this an advisable policy? A. No, sir; I don't feel it to be an advisable policy.

Q. 63. What are your reasons therefor? A. Because I feel that there are other and more satisfactory ways of meeting that situation. It seems to me as though there are two major ways which might be combined in order to deal with the maturities which will take place in 1940.

In the first place, I am convinced from my study of the stipulation, exhibits, and so on, in this case, that it would have been wise for the Maine Company to have purchased a substantial amount of the securities whose maturity

would arrive in 1940 prior to this date. I think that it would have been wise for them to have pursued that policy prior to the years in question at various times. I think it would have been distinctly wise policy to have made purchases during the years in question, at which times the market prices of these securities were decidedly below par, and, as I indicated yesterday, in December 31, 1929, the Maine Company had large liquid resources, a very substantial part of which was in the form of cash, and a further substantial part, so far as I can learn, in the form of general market securities.

It would not have been possible with the resources available during these years to have retired all—purchased all of the securities in question, but I feel that if I had charge of the situation, having pursued that policy, as far as the circumstances would reasonably permit, to plan then to refund the securities that were maturing in 1940, and thus eliminate the necessity of accumulating funds in this way, pay them off in full.

The Member: May I ask you to elucidate what you mean by refunding after you said they couldn't have been purchased?

The Witness: I mean by that to retire, pay off these securities by the issue of new securities from which funds might be obtained for the payment of that portion which had not been acquired.

The Member: You mean the kind that could not have been bought?

The Witness: Where there was not sufficient funds to have bought them during this period.

The Member: Were they callable? Could they have been refunded before their maturity if they couldn't have been purchased?

The Witness: No, Your Honor, not the New Jersey bonds.

They were non-callable, I believe. Apparently I haven't made myself entirely clear.

What I meant to indicate was that I would arrange for their refunding of any amount not purchased at the maturity of the bonds. Have I made myself clear there?

The Member: Well, I think I understand what you say. Do you mean that although the issue would have been outstanding as an issue with some of them not purchaseable because they weren't available for purchase, nevertheless you would have purchased those that you could have purchased and refinanced that part; is that what you mean?

The Witness: And refinance the part which I could not purchase before 1940, in 1940, at the time of the maturity. I am not suggesting to call in the bonds which I understand were non-callable, but what I want to say, trying to say, is that I would have purchased all of the bonds which the circumstances would have made reasonably possible, giving due consideration to all of the various factors, immediate consideration; and the maturities of the bonds which I had not purchased, I would have arranged for their refunding, refinancing at the maturity date.

The Member: At the maturity date?

The Witness: Yes.

The Member: In 1940?

The Witness: In 1940. I would refinance what I could not purchase in the meantime, those I had in my possession.

The Member: Well, you have to refund those if you are going to do anything about it in 1940. You have to pay them. You have to redeem them in 1940, don't you?

The Witness: Yes, sir.

The Member: I don't get the thought about refunding them in 1940 if the corporation is going out of business. It is, isn't it, in 1940? The bonds are going to mature, become

due. I don't understand what is meant by refunding those bonds of the forthcoming extinct corporation.

The Witness: I will see if I can make myself clear in that regard. As I understood the question, it was whether or not I would attempt to accumulate in the treasury of this enterprise sufficient cash funds for 1940 so that when those bonds matured in 1940 I would have sufficient cash in my treasury from the accumulation made up from earnings during this period, reserved for that purpose, a sufficient amount to pay off those bonds, and I indicated that in my opinion I would not attempt to accumulate the full total amount, pay off those bonds at maturity. On the other hand, what I would do would be to purchase currently during this period bonds as they might become available, and as funds might be available to be used for that purpose, as many as I could, giving due consideration to those circumstances, and that in 1940 when the bonds matured I would arrange to pay them off from funds obtained by the issue of new securities.

The Member: Is that all you meant by your expression of refunding the balance?

The Witness: Yes.

The Member: Yes, all right.

The Witness: I think so. That is the result I was trying to obtain.

I. (Continuing.) It seems to me that this procedure which I outlined is a perfectly possible and reasonable procedure to follow, and one which would be to the best interest of the enterprise.

If I may refer to some figures to indicate why I think this would be possible, I find that in the treasury of the New Jersey Company is a block of Indiana Harbor Belt 4's, par value of 2½ million dollars. Upon the payment or refunding of this issue, those bonds will be released and available for disposition, sale.

I also find that on December 31, 1933, there were loans by the Maine Corporation to Mr. Prince, which I understand were liquid loans, and he was presumably in a position to repay, thus placing the Maine Company in funds.

I also find that the Maine Company at that time had cash of $7,500,000. I made reference to the other investments by the Maine Company. Presumably they were general market securities. And I made no reference to any of the other liquid assets of any of the other companies of this group.

The total of those amounts would be, in round figures, 15 million dollars at that time.

I find that maturing in 1940 were 14 million of the New Jersey 4's and 5's.

I find that maturing in 1945, but guaranteed by the New Jersey Company, $2,327,000 of Elevated Railroad bonds, which presumably would demand consideration at that time. And I also give consideration to some other securities, which might or might not demand consideration, depending on the action taken.

The New Jersey Company preferred stock of 6½ million, and Maine bonds of approximately—outstanding in the hands of the public, amount to $3,200,000. And I also put in a figure in excess of $300,000 to represent the value at the approximate market price of the nine dollar guaranteed common stock of the New Jersey Company in the hands of the public, making a total of $26,850,000, in round figures.

Now, one or two courses of action, it seems to me, will be possible: One is to continue the New Jersey Company by procuring a renewal of its charter, which, while obviously not sure at this time, nevertheless seems to me to be a matter which reasonably—a consummation of which might be reasonably contemplated, if it should be desirable.

Mr. Welch: You say should be desirable?

The Witness: If it should be desirable.

Mr. Welch: Yes.

The Witness: No definite bar of the decision is made in that respect.

Mr. Welch: I see.

The Witness: Another possibility would be the elimination of the New Jersey Company and the assumption of its assets and liabilities by the Maine Company.

I confine myself to those possibilities, although I think there are others which might be employed.

If these liquid assets which I referred to were devoted to the retirement of the securities in question and other funds obtained from refunding were obtained to meet the difference, an amount of 12, 15 million dollars might be required. This, it seems to me, would be perfectly reasonable to anticipate, obtaining through a refinancing operation, which, if consummated, would eliminate the debt, the present existing debt, of the New Jersey Company, the Maine Company, the Elevated Company, leaving no debt against them, and making it possible to use the stock of the Transit Company, the Railway Company, and, in addition, if desired, the stock of the Produce Terminal Company and of the Central Manufacturing District as security for obtaining these funds. It does not appear to me as though it would be necessary to use all of these securities as a basis for this refinancing operation.

The Member: Can you tell me briefly what you mean by refinancing?

The Witness: By the sale—I will put it this way: When bonds mature and become due, it is necessary, if the company is to remain solvent, to pay them off. One of the ways in which funds may be obtained for paying off securities that are due is to buy an issue of other securities, from which funds might be obtained. If this is done in collateral or other assets which may have been used to secure this

issue, they are released and become available as securities for the new issue.

The Member: Is that what you mean by refinancing?

The Witness: Yes.

The Member: Now, cannot that be stated, in the layman's language, as substituting new creditors for the old ones?

The Witness: In the layman's language, yes.

The Member: What is the point in that? What is the point of liquidating the debt of A by borrowing money from B to create a debt to B?

The Witness: Because—

The Member: Generally speaking, that is what you mean by refinancing?

The Witness: Yes. That is, Your Honor, constantly being done, particularly in the case of industries of various kinds, where the investment in them is of a relatively permanent character.

We can see that, of course, in—take an illustration from an industry outside of this field, the public utility field, where they constructed a large generating and distributing system for electric power. The expectation is that that system will continue for an indefinite time. Funds to create this system are obtained by the sale of bonds with a maturity of relatively a short number of years as compared with the expected relative durability of the generating and distributing system.

The Member: Well, that is because you are changing the terms of your indebtedness, substituting for a present indebtedness which has terms which you regard as, to some extent, unfavorable, substituting for that an indebtedness with terms that eliminate some of those unfavorable terms, and, on the whole, are regarded as more favorable under the particular circumstances then existing. Is that what you mean to say?

The Witness: No, because from time to time your indebtedness matures at a period when business conditions are such that it is necessary to obtain capital, obtain funds from a new creditor to pay off the ones due the old creditor on terms which are not so favorable as the terms on which the funds were obtained originally. You may better your terms or you may find your terms worse. The terms on which you can obtain your credit will depend on two major factors, the general business and economic situation and the position of the borrowing corporation.

The Member: Yes, but I am talking about the voluntary substitution of one indebtedness for another. You can only do that when the terms of your new indebtedness could be an improvement on the terms of the old.

The Witness: That is true, sir, but here we have a definite date, 1940, when you have no choice in the matter. Your securities mature at that time. You will have to pay them off. I included the Maine bonds in this consideration partly on the assumption that the terms of the indenture, if I remember correctly,—if the New Jersey Company is not kept alive, the maturity of the rest of the bonds, I believe, will be in 1961; and I am including the other Railroad Company bonds in my consideration because they are guaranteed by the New Jersey Company, although they do not mature until 1945. Nevertheless, if the New Jersey Company is to be liquidated then it is necessary to make provision in some way for those bonds.

I have given consideration in my study of this matter primarily to the financial considerations and not to a certain legal consideration as to the best state in which to incorporate, etcetera, and items of that kind.

Mr. Pierson: You may examine.

Mr. Welch: Could I have a copy of the record?

(A copy of the record was handed to the witness.)

Cross-examination.

X-Q. 64. (By Mr. Welch). Dr. Atkins, would you be good enough to turn to page 928 of your testimony? A. Yes, sir.

X-Q. 65. The second full paragraph from the bottom is the one to which I am directing your attention. As I recall it, you began your testimony with a review of the 1929 position— A. Yes, sir.

X-Q. 66. —of this enterprise. You remember that, sir? A. Yes, sir.

X-Q. 67. And you spoke as of December 31, 1929. A. Yes.

X-Q. 68. And you said, on page 928: "I can see no particular reason, therefore, to anticipate as of my date, the 31st of December, 1929, any marked probability of emergency demands being made upon the resources of any of the companies in this group in the immediate future—serious emergency demands." A. Yes.

X-Q. 69. Is it correct, Dr. Atkins, that as of December 31, 1929, you could see no cloud on the horizon? A. May I ask you to define what you mean by "cloud on the horizon"?

X-Q. 70. I will take your own words. Is it true that you could see no marked probability of any emergency demands? A. Not in the case of the immediate affairs of these companies.

X-Q. 71. You just could not see it. Of course, you had in mind as of that date that something pretty bad had happened in the previous October, had you not? A. Yes, sir.

X-Q. 72. And living your life a year or two ahead, using a little hindsight, there were some tough things just ahead, weren't there? A. The general business situation, yes.

X-Q. 73. And tough for this company? A. Situations which the—burdens which the Maine Company decided to assume.

X-Q. 74. Well, tough for the enterprise, let us say. A.

Because the Maine Company definitely assumed burdens which were outside of its normal functions.

X-Q. 75. So that you think the Maine Company assumed burdens outside of its normal functions? *A.* I think so.

X-Q. 76. You do. Well, would you say that it might be a normal function of the Maine Company to keep the enterprise in Chicago going? Is that right? *A.* I want to make certain that I am answering the question.

Read the question again.

(Last question read.)

A. The Maine Company had, I believe, certain reasons for sustaining and helping the subsidiary and allied companies. Does that answer your question?

X-Q. 77. Well, I think so, except I would like you to say to me, as I think you are ready to, that a normal function of the Maine Company would be to keep the enterprise in Chicago running. *A.* Persist in keeping it running?

X-Q. 78. Yes. Not long after this December date of yours, emergency demands did arise, didn't they? *A.* May I ask what emergency demands you are referring to?

X-Q. 79. I am referring to your own words in your testimony. You know what it means since you used them, don't you? *A.* I said that I didn't — if I read here correctly, that I didn't see any marked probability of emergency demands being made upon the resources of any of the companies in this group in the immediate future, serious emergency demands, and now you ask me if emergency demands did not arise, and before I answer I would like to know what you mean by "emergency demands."

X-Q. 80. Just whatever you mean when you used them in your answer to the question. *A.* And also what you mean by the immediate future, how you are defining that.

X-Q. 81. I am defining it as reasonably near future, let's

say the next two or three years. Now, are you fixed so you can answer? A. I think so, yes.

X-Q. 82. All right, let's hear you answer. A. I think there were certain emergency demands of which the Maine Company undertook to assist in meeting.

X-Q. 83. I was interested yesterday in your testimony about the Maine Company being a holding company, and I think, nothing else, is the way you as an expert liked to describe it. A. Yes, sir.

X-Q. 84. Would you be good enough to turn to your notes from which you testified along that line?

Mr. Welch: Could I, without prejudice, glance at these (referring to paperwritings exhibited by the witness)?

Mr. Pierson: Is that—

Mr. Welch: The notes from which he testified.

Mr. Pierson: Well, I see no reason—he has just used that to refresh his memory.

Mr. Welch: Yes, my question is, could I look without prejudice at them.

Mr. Pierson: I object to your looking at them.

Mr. Welch: Then I call for them. I call for them. I have the right to call for them, and I call for them.

(A paperwriting was handed to Mr. Welch by the witness.)

X-Q. 85: (By Mr. Welch). Will you tell me, sir, when you made out these two yellow sheets of notes that I have in my hand from which you testified that in your opinion the Maine Company is a holding company and nothing else? A. When I made them out?

X-Q. 86. Yes. A. I couldn't say the exact date; during the last week or ten days, since I came to Washington.

X-Q. 87. Prior to the opening of the testimony or after the opening of it? A. I think it was probably after the testimony had opened.

X-Q. 88. How soon after? A. Well, I couldn't say. I don't recollect.

X-Q. 89. Now, these are all the sheets that you used in testifying to an opinion that the Maine Company is a holding company and nothing else, aren't they? A. I think those are all the sheets that I used.

X-Q. 90. I don't observe on those sheets any reference to the testimony in the case. Do you? A. No, but I didn't say that was the only information which I used in testifying.

X-Q. 91. I quite understand. Now, will you be good enough to tell us the names of the witnesses whose testimony in the case you considered significant on the question of whether or not the Maine Company is a holding company only? A. I think perhaps I considered the testimony of the analysis presented by Mr. Merriman as having significance.

X-Q. 92. Yes. A. And I think I considered of some significance the testimony of Mr. Prince, possibly, and I really couldn't say which others that I gave consideration to. Let me see if I can think of the names.

X-Q. 93. Let me tell you the names and you tell me or just say "significant" or "insignificant" on this point. Mr. Leonard. Significant or insignificant? A. Some significance.

X-Q. 94. Some significance? A. Yes.

X-Q. 95. Mr. Austin. Significant, insignificant? A. I don't remember the significant points. There may have been, but I don't recall them.

X-Q. 96. Mr. Henkle. Significant, insignificant? A. Possibly of some significance, although I don't have specific recollection of that.

X-Q. 97. Mr. Hackett. Significant, insignificant? A. Possibly of some significance, yes.

X-Q. 98. Some significance? A. Yes.

X-Q. 99. Mr. McDonough. Significant or insignificant? A. I think I would attach some significance to that.

X-Q. 100. Mr. Reimers. Significant or insignificant? A. I don't think I would attach any in that connection.

X-Q. 101. None whatever? A. Not much.

X-Q. 102. Well, let's consider Mr. Reimers just a moment and what he testified to. Will you? A. Yes.

X-Q. 103. Now we are clear that you think his testimony had little significance? A. Well, relatively little, yes.

X-Q. 104. Relatively little? Don't start running away on me, now. I would like to have you stay as close to "little significance" as you will. A. All of these witnesses whose names you have mentioned, if I recollect correctly, made certain statements in regard to the inter-relationships of certain parts, at least, of this organization, and I attach some significance to what they say. Now, I have not given this matter specific thought in an attempt to weigh as to how much significance I would give the testimony of each one of those. You raise this question, and I will therefore—

X-Q. 105. That makes it fun for me, because I can have you do it right now, you see. A. I see.

X-Q. 106. Now, let's compare, if you will for me as an expert the significance you attributed to the tax returns from which you testified— A. Yes.

X-Q. 107. —with the significance you attributed to Mr. Reimers' testimony; which seemed to you much more significant. A. To my mind the information obtained from the tax returns was very much more significant.

X-Q. 108. Yes. Now, do you remember the chief subject about which Mr. Reimers testified? A. He testified with regard to the bank situation, and, more specifically, the conditions under which the Live Stock National Bank, or, possibly, its predecessor, was established and the changes effected there.

X-Q. 109. Do you remember that he testified as to what all the companies did, Mr. Prince and Mr. McDonough said what they should do? Do you remember he said that? A. I am willing to assume that they did if you refresh my memory in that respect.

X-Q. 110. And that the Maine Company issued orders as to when they should do it? A. Once more I am willing to accept your refreshing my memory. I think that is correct.

X-Q. 111. Do you remember that he said that the Maine Company decided what amount should be subordinated in these subordinated deposits? A. I think that is probably correct.

X-Q. 112. And you remember that he testified on what levels they were to be subordinated was decided by the Maine Company? A. I think that is probably correct.

X-Q. 113. You also remember that Mr. Leonard and Mr. Hackett testified that on the bank crisis that was a 10 million dollar affair, they just did what they were told to do by the Maine Company? A. I think that is substantially correct.

X-Q. 114. Now, does that seem to you much less significant on the question of whether the Maine Company is a holding company than these ancient tax returns at which you have looked? A. Yes, sir; I do.

X-Q. 115. Much less significant? A. Very much less, yes.

X-Q. 116. Now, I observed that you made some calculation from some source in tax returns about the percentage of time Mr. Prince spent on different things. A. Yes, sir; I—excuse me. May I correct that? I didn't make any calculations. I copied down some figures which appeared in the tax returns.

X-Q. 117. Yes. And I was a little tired when you were testifying, but I was under the impression that you added it

up in such a way that you reached the 100 percent, so that Mr. Prince had no time to devote to the Maine Company; is that right? A. If I copied these figures correctly, and I believe I have, that is true.

X-Q. 118. That is the result you reached. Now, you realize, of course, that this Maine Company is—oh, what should we say—a 30 million dollar concern? A. If you wish to name it so, yes.

X-Q. 119. Would you say that was a fair rough description of it? A. I would accept it as a rough description.

X-Q. 120. And you realize, of course, that in the year 1930 Mr. Prince owned all its common stock? A. I do.

X-Q. 121. And was the entire owner of that great company and the single enjoyer of its profits? A. That is my understanding.

X-Q. 122. Dr. Atkins, did it strike you as odd at all when your mathematical calculation proved to your satisfaction that he gave no attention to a 30 million dollar concern out of which he got $400,000 a year in dividends? A. I am not certain of that question.

Mr. Welch: May it be read? Let it be read to you if you didn't understand it.

(Question read.)

A. No.

X-Q. 123. (By Mr. Welch). You were satisfied with your mathematical calculation? A. Well, the figures from the income tax returns I find add up to 100 percent.

X-Q. 124. Right. And you drew the conclusion that he had no time to devote to the Maine Company and did devote no time to this huge concern, didn't you? A. I didn't say he devoted no time. His income tax return for that company states on it, in so far as time is concerned, "As required."

X-Q. 125. Yes. "Time as required"? A. Yes.

X-Q. 126. Well, I will pass along from that. Just between

you and me, Dr. Atkins, and as an expert, don't you think he probably devoted just a touch of time now and then to the Maine Company? A. Mr. Welch, I spent a year in the employ of another man holding a holding company and if I am to draw any conclusions from my experience of that kind at that time, it would not surprise me at all that Mr. Prince spent exceedingly little time as president of the Maine Company.

X-Q. 127. Did you hear him testify that after Mr. Sporr's death in 1926 he devoted his whole life to this enterprise? A. I think that he testified to that.

X-Q. 128. Did that seem in any way cogent to you as compared to something you found on a tax return? A. I believe you referred here, didn't you, to the enterprise, meaning thereby the assembly of companies?

X-Q. 129. I am the one that asks the question. If you don't understand the question ask to have it re-read.

Mr. Welch: Will you please have that read?

(Question read.)

X-Q. 130. (By Mr. Welch). I think that can be answered "yes" or "no" without a speech about some other concern you worked for. A. You said something about "enterprise" in the last question. I thought—perhaps I am mistaken.

X-Q. 131. I have had the one read to you that I would like to have you answer. A. I am still a little confused.

Mr. Pierson: That was followed by another question.

The Member: The question that the witness is confused about is not the question that was read. I don't know whether it was the last question or the question before the last, but there was a question in which the word "enterprise" was used. Can you turn to that, Mr. Reporter?

The Reporter: Yes, sir.

(Record read.)

The Member: Now, answer that last question.

A. I am not surprised that he devoted his entire time to the enterprise, for I understand by "enterprise," as it has been used in the testimony in this trial, that it refers not only to the Maine Company but also to the subsidiary and related companies, the entire set-up, and I am not surprised he devoted his time to that, which is in accord with the information I obtained from the tax return.

Mr. Welch: If Your Honor is satisfied with the answer, I am.

The Member: I don't think I have to be satisfied with it.

Mr. Welch: You are the one I am trying to please in the end.

The Member: I will let you be satisfied, or not, as you will, for the time being.

X-Q. 132. (By Mr. Welch). Now, I want you to turn for a moment to Exhibit S-52 attached to the stipulation. Can you find that? *A.* I think so.

X-Q. 133. And Respondent's Exhibit D. I notice that both you and your predecessor on the stand, in talking about surplus, always talked from Exhibit D, did you not? That is what you call the adjusted surplus? *A.* I think that is correct.

X-Q. 134. Now, I would like better talking from Exhibit S-52, which is the surplus as per books. Would it be too much pawing back and forth to compare the surplus per books from S-52 with the surplus, adjusted surplus in Exhibit D, year by year, from '29 through to '33? *A.* I will endeavor to do so. That is the Maine Company. Is there any objection if I put this sheet down below and put the other sheet on top?

X-Q. 135. Oh, goodness, no, anything that helps you. *A.* That top sheet has an Exhibit number stamped on it.

X-Q. 136. Now, will you give the figures to give, giving me first, if you will, the figures as per books from S-52 for 1929 and following it with the same year from Exhibit D? A. I will endeavor to.

X-Q. 137. Go ahead. Will you give them? A. The totals for the years or what figures? These are the balance sheets.

X-Q. 138. The total of the item of surplus. A. Oh, total of item of surplus. Excuse me. The total for surplus on S—

X-Q. 139. 52, is right. A. S52—

X-Q. 140. For '29. A. In other words, that is per books as shown, a surplus of $9,854,485.

X-Q. 141. Let's leave off the dollars. Let's stop at the thousands, don't you think? A. All right, sir.

X-Q. 142. It will serve my purpose. A. Very good.

X-Q. 143. $9,854,000. A. And a capital surplus of a little more than $6,000,

X-Q. 144. No. I want only the $9,800,000 figure. A. I see.

X-Q. 145. And the comparable figure given there is $19,616,000, in round figures.

X-Q. 146. The next year? A. In 1930, according to the books, the figure is given as $12,423,000, in round figures; and, according to the revised balance sheet, it is $22,184,000. You wish me to continue for the succeeding years?

X-Q. 147. If you will, please, right through to '33 only. A. You wish me to omit '31 or include that?

X-Q. 148. Oh, omit it. A. 1932, as per books, surplus of $16,154,000. The surplus, according to the revised balance sheet, $25,915,000. And in 1933, surplus per books of $15,763,000; and, according to the revised balance sheet, $27,759,000.

X-Q. 149. Now, I notice, Dr. Atkins, that every time you or Mr. Merriman refer to an item of surplus you use this Exhibit D; do you not? A. I can't speak for Mr. Merriman, because I did not attempt to check his testimony that closely,

but I think in my studies and my testimony I have referred to Exhibit D.

X-Q. 150. You stated always from Exhibit D because the figures are much larger and sounded much happier to you? *A.* No, sir; I do not. I stated from—

X-Q. 151. I didn't ask you why. I just asked you if that was one reason why. *A.* No, sir.

X-Q. 152. Now, let me consider the item of surplus for a moment. *A.* Very well.

X-Q. 153. That is an item on the liability side, isn't it, of the balance sheet? *A.* It is an item on the liability side, but is not a liability.

X-Q. 154. That is all I have asked you, Doctor. *A.* Yes.

X-Q. 155. We will do better if you just answer my questions. *A.* Very good.

X-Q. 156. Now, dividends are paid out of property, aren't they? *A.* Yes.

X-Q. 157. That is clear, isn't it? *A.* I think so, if I understand your word "property."

X-Q. 158. Yes. And the property that you have available out of which you can declare a dividend is the upper limit of what your dividend may be, is it not? *A.* I would say so.

X-Q. 159. Now, would you take a pencil and set up a little balance sheet for me of a company to whose directors' meeting I am going to take you in a moment. *A.* Do you wish me to use these figures here?

X-Q. 160. No, please. Will you set up a simple little balance sheet for me for a company that you and I are going to run together in a moment? Will you put on the asset side "Cash, $10,000"? *A.* (Witness does as requested.)

X-Q. 161. And put on the asset side, "Plant and Equipment, $1,000,000"? (Witness does as requested.)

X-Q. 162. And will you put on the other side— *A.* Just

a moment, please. I haven't given enough space to write the million.

The Member: I think we had better construct this balance sheet after a few minutes' recess.

(There was a short recess taken.)

X-Q. 163. (By Mr. Welch). How does your balance sheet look now? You have on the asset side, cash, $10,000. *A.* I will have in just a moment, sir.

X-Q. 164. The plant and equipment, a million. *A.* Plant and equipment, a million.

X-Q. 165. On the liability side, capital, $10,000. *A.* Surplus, $1,000,000.

X-Q. 166. Now, with that little balance sheet before you and me as a director, when we meet to declare a dividend, we can't declare our plant and equipment out as a dividend, can we? *A.* Not very well, sir.

X-Q. 167. Now, let us take the same little company, if you will, and go along to a later and happier year and have a little directors' meeting about a dividend; will you? *A.* Yes, sir.

X-Q. 168. Let us assume we sent for our bookkeeper and we say to him, "Mr. Snooks, what are our gains and profits for this year?" And he says, "One million dollars." Will you make a note of that? *A.* These are the gains and profits. Yes.

X-Q. 169. Yes; our bookkeeper just told us we have gains and profits of a million dollars. *A.* Yes, sir.

X-Q. 170. And we say, "Good, Mr. Snooks. How much have we got in the bank?" And he says, "One million dollars." Will you assume that? *A.* In the bank, $1,000,000. Yes.

X-Q. 171. And then we say to him, "Mr. Snooks, how much have we got in surplus?" And he says again, "One million dollars." Will you make a note of that? *A.* Yes.

X-Q. 172. Now, let us assume that you and I say to each other, "We would like to declare a dividend this year. We have got gains and profits of a million dollars; we have got a million dollars in the bank; and we have got a million dollars in our surplus account." If we want to have all we can have, we can declare out a million dollars, can't we? A. So that I shall not be confused, are you setting up a new balance sheet?

X-Q. 173. I am not setting up a new balance sheet. We are in a later year. We have had a splendid year. We have a million dollars in gains and profits; we have a million dollars in the bank; and we have a million dollars in the surplus account. A. We have a million in gains and profits; we have cash in the bank of a million; and we still have a million in surplus

X-Q. 174. Well, I don't care. Put down two million on the side. A. All right.

X-Q. 175. Now, on the basis of your previous question, all you and I can declare out of dividends is our total gains and profits and our total amount of our bank deposit, $1,000,000, isn't it? A. We can declare out our total gains and profits, limited by the total amount in the bank.

X-Q. 176. That is right, yes. A. Yes.

X-Q. 177. Now, let us assume that while we are meeting in our directors' meeting a revenue agent comes in and says to us, "I know how to set up a balance sheet that will show a lot bigger surplus, if you will just give me a Revenue Act and a pencil. I will make your surplus four millions instead of two." Will you assume that? A. Yes, sir.

X-Q. 178. Now, after he has got his pencil and his Revenue Act and his adjusted balance sheet he has not done any magic that will let us declare a bigger dividend, has he? A. Not so far as I know, from what you said.

X-Q. 179. And so, when we deal in this case with surplus,

don't you think it would be fairer to my side of the case if we took the balance sheets per books instead of some funny thing called an adjusted balance sheet? A. No, sir; I do not.

X-Q. 180. You do not think it would be fairer? A. No, sir; for the simple reason—

X-Q. 181. I do not ask you for the reason. Your friends can ask you that. A. Thank you.

X-Q. 182. Now, I want to take up with you quite shortly the dividend policy of this company for the years '30, '32, and '33, and I won't bore us all by going to the meetings, as we did yesterday with Mr. Merriman; but just tell us, if you will, as an expert, what you say this concern should have paid out in the way of a dividend in the year 1930. A. On the basis of the information you gave me?

X-Q. 183. No; I am talking about this Maine Company. A. Oh, excuse me.

X-Q. 184. You remember Mr. Merriman told me what he thought should be declared out as a dividend. Now we have the pleasure of another fine opinion, and I want to know what you think should be declared out. Let us take 1930 first. A. 1930. We are going back and give full consideration to all the facts in the stipulation and so on?

X-Q. 185. Oh, indeed. Oh, indeed. A. I should be inclined to agree rather definitely with Mr. Merriman.

X-Q. 186. Rather definitely? A. Yes.

X-Q. 187. And what is that? A. As I remember correctly, it was approximately 60 percent.

X-Q. 188. Yes. Now, take the next year. What would you do in the next year?

The Member: That, as I recall, was $1,800,000, instead of the $400,000 that was declared.

The Witness: If that is the figure.

The Member: Well, look at the figures before you. I want

to be sure that I understand what you mean by 60 percent, because that is a sort of floating possible percentage. I want to be sure I know just what it is.

The Witness: Yes, it is very approximately that figure.

X-Q. 189. (By Mr. Welch). Now, what will you do for the stockholder in 1931? A. Once more, I would agree with Mr. Merriman and make it approximately 50 percent.

X-Q. 190. Oh, but he did not say that. A. Oh, but I will say that.

X-Q. 191. Fifty percent? A. Fifty percent.

X-Q. 192. Do you remember what he said? A. My recollection is that he gave a figure for the year 1931 of 50 percent.

X-Q. 193. Well, let me tell you what my memory is. He said 50 to 60 percent for 1931. Let us have Mr. Merriman's testimony and make sure we know what we are talking about.

The Member: Well, do you mind if I take this witness for a moment about this percentage? I would like to know whether there is any virtue in your mind in using a percentage figure rather than a dollars figure? To me it would seem that the declaration of the dividend would be first considered in terms of dollars, and after you have decided how many dollars to distribute you would find out, for a statistical or any other purpose, what percentage that is. Commonly, the percentage is declared on the value of the stock and not on the amount of the surplus.

Now, I notice that both Mr. Merriman and you speak in terms of a percentage, and I have ascertained by my own question that the percentage is a percentage of the earnings of that year.

The Witness: Yes, sir.

The Member: Now, am I correct in supposing that your first calculation would be in terms of dollars?

The Witness: Why, my first calculation is to determine in my own mind approximately how much of the net income I was going to declare as a dividend. I, of course, am doing this on the spur of the moment.

The Member: Yes.

The Witness: If I had time I would figure out the rate per share. I don't have the number of shares here. I am doing it in my head.

The Member: You say that first you ascertain the amount of the net income, then you determine how much would be distributed?

The Witness: Yes.

The Member: You would not think in terms of percentages, would you?

The Witness: If a dividend is declared, it will be declared as a round figure, 5, 10, or 25 percent, or 5, 10, or 25 dollars per share, but in trying to reach that I would first find out how much I would pay out altogether and then round it out, sir.

The Member: How much in dollars.

The Witness: Yes.

The Member: That is the thing that would be regarded as a controlling thing to determine.

The Witness: Yes.

The Member: That is what I want to be sure about, because you are speaking in terms of percentages as if that had some virtue in and of itself.

The Witness: It is purely as a matter of convenience, sir.

The Member: Very well.

X-Q. 194. (By Mr. Welch). Now, I am going to skip 1931 for a moment and go to the year 1932. *A.* Yes, sir.

X-Q. 195. What do you, as an expert, say should have been declared out in that year, and I guess my mind is less pre-

cise than His Honor's, for I am content with percentages A. I should say in '32 approximately 50 percent.

X-Q. 196. And in 1933? A. Likewise.

X-Q. 197. Fifty percent? A. Fifty percent.

X-Q. 198. Now, I notice that in '30, '32, and '33 you seem to agree precisely with Mr. Merriman. A. Yes.

X-Q. 199. Now, is that because, as he testified, you have respect for his judgment? A. No.

X-Q. 200. Is it just— A. It is—

X-Q. 201. You said no. Is it just a coincidence that you happen to say 60 in 1930, just as he does; 50 in 1932, just as he does; and 50 in 1933, just as he does? A. I should say it is a coincidence, yes.

X-Q. 202. Just a coincidence; is that right? A. That is right.

X-Q. 203. And I take it, from your point, a happy one? A. I have no objection to that.

X-Q. 204. Is this morning the first time you had fixed your mind on that percentage that should be declared out? A. No.

X-Q. 205. You just told us a moment ago that you had not really considered this previously. A. I made no serious study of this. The question that was brought up was the one I answered in the course of this case.

X-Q. 206. Don't you know that the crux of this case is the amount of dividend outlined by this company in this year? A. My understanding is it is the unreasonable accumulation of gains and profits beyond the needs of the business.

X-Q. 207. Yes, and the accumulation is earnings less dividends? A. Yes.

X-Q. 208. And you know, do you not, Doctor, that what we are talking about now is the absolute crux of this case? A. Well—

X-Q. 209. Just "yes" or "no." A. May I have the question again?

(Last question read.)

The Witness: I understand dividends is the absolute crux of this case.

X-Q. 210. (By Mr. Welch). Well, accumulations is the crux, isn't it? A. I assume that is one of the major points.

X-Q. 211. It is the major point, isn't it? A. I don't know.

X-Q. 212. You don't know. A. No.

X-Q. 213. Well, will you assume with me that it is a major point? A. I agree with that, sir.

X-Q. 214. Will you assume with me that the Government is complaining about this taxpayer because of unreasonable accumulations? A. Yes, sir.

X-Q. 215. Now, you just told me that accumulations are earnings less dividends, did you not? A. If I remember correctly and interpret that correctly, yes.

X-Q. 216. Now, have you any doubt, Doctor, that we are now talking about the crux of this case? A. It seems to me that there are certain other—at least one other point of major importance in this case.

X-Q. 217. Well, O. K. But is this thing we are talking about now of major importance? A. I have already stated that twice.

X-Q. 218. Have you come into the courtroom the second day without having considered this point, which you know is of major importance in this case? A. I considered the point of dividends paid out, if, in my opinion, it was a reasonable distribution of the earnings for that period, and it seemed to me that there was not. I have not given detailed consideration to an attempt to determine exactly how much should be declared.

X-Q. 219. Now, what I want to know, Doctor, let us be

fair with each other. Are you making up your own mind about '30, '32, and '33, or are you deferentially following Mr. Merriman? A. I am making up my own mind.

X-Q. 220. All right. Make up your own mind about the year 1931, will you, please? A. Yes.

X-Q. 221. Make up your own mind and tell us what should be declared out in that year. A. I will say 50 percent.

X-Q. 222. You remember Mr. Merriman said 50 to 60. A. If you say so.

X-Q. 223. I will read it to you. Here is my question, on page 890:

"Now, just one more thing, Mr. Merriman. When we talked about these years '30, '31, '32, and '33, you started saying 60 percent might go out.

"Yes, sir.

"And the next year, in '31, 50 to 60?

"Yes, sir; I think I said 50 to 60."

That was his testimony.

A. All right, sir.

X-Q. 224. Now, you vote this morning for 50? A. Yes.

X-Q. 225. And it is clear that Mr. Merriman voted for 60? A. I think he said 50 to 60.

X-Q. 226. And in dollars that 10 percent variation runs into substantial sums of money, doesn't it? A. Yes.

X-Q. 227. It follows, doesn't it, that men as honorable and as honest as you and Mr. Merriman may have honest differences about dividend policies running into substantial sums of money? A. That is always possible. In 1931—

X-Q. 228. Your answer is "That is always possible," is it not? A. Yes.

X-Q. 229. And that has happened right in the courtroom, hasn't it? A. Apparently.

X-Q. 230. And after all, Dr. Atkins, these things come

down to a question of judgment, don't they—these dividend declarations? A. Yes.

X-Q. 231. And in those tough years from '30 to '33 all directors could do was to meet and look at the clouds and the difficulties and reach an honest judgment of what might reasonably go out of the corporation, wasn't it? A. Yes.

X-Q. 232. I take it, however, you would say to me that an expert like yourself can do a better job than the directors, themselves? A. Under certain conditions, yes.

X-Q. 233. And this is one of those conditions? A. I don't know what the directors did, how often they met, to enable me to answer a question of that kind.

X-Q. 234. Well, you know what dividends they declared, don't you? A. I know what dividends they declared. I don't know what discussion preceded the declaration of those dividends.

X-Q. 235. Well, I said I would not take you through the possible discussions that may have occurred, and I won't. Now, let me turn you to the year 1933, will you, please. A. Yes, sir.

X-Q. 236. And would you look for a moment at your testimony on pages 925 to 930? I don't mean to read it all, but just glance at what you were testifying yesterday. A. 929 and 930?

X-Q. 237. 925 to 930. A. Excuse me.

X-Q. 238. You were discussing the income of the subsidiaries and the extent of the stability in support of your opinion on unreasonable accumulation. Do you remember that you were? A. The first item I see, I was discussing certain assets of the companies.

X-Q. 239. I am not going to examine you closely on what you said. I just want to refresh your recollection as to what you were discussing. A. Yes.

X-Q. 240. Now, all through those pages you discussed the

income of the subsidiaries, did you not? A. Apparently I did.

X-Q. 241. That, of course, is in part because the Maine Company has very little income except such as is pushed out from the subsidiaries? *A.* Yes, sir.

X-Q. 242. Now, I am going to have to ask you to do a little work with the stipulation and with a pad,—I mean the exhibits attached to the stipulation, and I am dealing only with the year 1933, and you are going to have to handle red ink as well as black ink figures. *A.* Yes, sir.

X-Q. 243. Turn first to S-3, will you, please, sir? *A.* Yes.

X-Q. 244. Now, have you before you the income and the expense of the Transit Company for '33? *A.* Yes, sir.

X-Q. 245. What was it, sir? *A.* There were various— which figure on this page do you—

Mr. Welch: May I step into the witness box to point out to him?

The Member: Yes.

X-Q. 246. (By Mr. Welch). What was the result of the Transit Company's operation as per S-3 for the year 1933? A. You refer to this photostated sheet. There is attached here another sheet which—

X-Q. 247. No. I am speaking as per books. *A.* As per books.

X-Q. 248. Yes. *A.* Excuse me, sir. Thank you. In 1933, the total net income, per books, shows a loss of $1,070,000, in round figures.

X-Q. 249. Will you put that down as a loss in that year for the Transit Company? *A.* Yes.

X-Q. 250. Have you got a good strong mark meaning "loss"? *A.* Yes, sir.

X-Q. 251. So I can boast about that later. Now, turn to S-5, Harness & Saddlery. I think there you will find a gain

per books. A. Net income per books in 1930—did you say 30 or 33?

X Q. 252. We are talking about 33 only. A. 33.

X Q. 253. Yes. A. 33 showed a gain of $4,290.

X Q. 254. And select some round figure that is convenient for you to handle. A. All right, sir. Call it $4,000.

X Q. 255. All right. Look at S-8 and do this for me, if you will, on the Railway. A. Railway, net income per books in 1933 was $1,352,000, in round figures.

X Q. 256. What are you going to use? A. I will take $1,352,000.

X Q. 257. Why don't your take $1,350,000? That will do for my purpose. A. All right.

X Q. 258. Now, the Railroad Company, S-12, please always for '33. A. Once more I am confronted with a sheet attached as per books, a photostated sheet for 1933, Railroad shows a loss of $53,590.

X Q. 259. And what will you use as a round figure? A. Fifty four.

X Q. 260. All right. Now, the Produce Terminal, S-24, will you please? A. Produce Terminal Corporation, net income per books for 1933 showed a gain of $29,850.

X Q. 261. And would you use $30,000? A. All right, sir.

X Q. 262. You gave me a break on some odd things a moment ago. Now, turn to the Jersey Company, S-26. A. Yes, sir.

X Q. 263. You will have to do a little sum for me there because I want its net income, if I may, less dividends for subsidiaries. You follow me? A. Will you indicate the columns you are referring to, please?

X Q. 264. That is one there (indicating), and that the other one, you see. A. I see.

X Q. 265. I want its net income disregarding intercorporate dividends, and by that, of course, I mean dividends of

subsidiaries. A. Do you wish me to read off my calculation?

X-Q. 266. If you please, sir. A. Well, I find here in 1933 distributions of $2,900,000, in round figures, and I find net income, in round figures, $2,270,000.

X-Q. 267. Right. A. I have taken the difference between those two and found the difference to be $630,000.

X-Q. 268. And that is a loss, is it not? You observe that that is a loss? A. Yes.

X-Q. 269. So put that $630,000 over on my loss side for me, will you, please?

Mr. Welch: This won't take much longer, Your Honor.

X-Q. 270. (By Mr. Welch). Now, take C. M. D., will you, please, from S-54. A. Excuse me. What is the next?

X-Q. 271. S-54—S-34. I think I have misread this. I beg your pardon. A. Yes, sir.

X-Q. 272. Net income per books— A. Net income per books of Central Manufacturing District trust is shown, in round figures, as $238,000.

X-Q. 273. That is the figure you are taking, sir? A. Yes, sir.

X-Q. 274. Now, we will take up the tiny Central Storage and Forwarding Corporation, on S-36. A. Yes, sir.

X-Q. 275. What do you find? A. It shows a net loss per books of $5,500, in round figures.

X-Q. 276. What do you take that as, fifty-five hundred or five thousand? A. Fifty-five hundred.

X-Q. 277. You will put that down on the loss side, won't you? A. On the loss side, yes.

X-Q. 278. Now, let us pick up the Pau Corporation. That is in S-63, I think. A. Yes.

X-Q. 279. Now, what is it, sir? A. Net income per books in 1933 was a loss, in round figures, of $500.

X-Q. 280. Put it down, if you will. A. Yes.

X-Q. 281. On the loss side. A. Yes.

X-Q. 282. Now we reach the Maine Company, the top company. That you get from S-51. A. S-51?

X-Q. 283. Yes. A. Yes, sir.

X-Q. 284. And I would like to exclude intercorporate dividends again and have the Maine Company's net income stated. A. Once more the precise—

X-Q. 285. It will turn out to be the net income less whatever it received in the way of distributions from subsidiaries. You should find the net income figure at $2,343,840.98. A. Yes, sir.

X-Q. 286. And that it received from its subsidiaries $2,185,460.44. A. Total distributions to the New Jersey Company and Produce Terminal. That is the figure, I believe.

X-Q. 287. Yes. A. Yes.

X-Q. 288. So that exclusive of intercorporate dividends, you get a Maine net income of what? A. A loss of $55,000.

X-Q. 289. I think you are wrong. I think that is a profit of about $58,000. A. Yes. All right.

X-Q. 290. Please be clear, Dr. Atkins,—nobody is going to kick about a mistake in arithmetic. A. Yes.

X-Q. 291. Add it up for me now on both sides, the profits and losses, will you please, sir? A. Well, sir, if my arithmetic is correct, and it is not very well set down here, I find that the gains are, approximately $1,590,000, and the losses, approximately $1,760,000. Is that approximately your figure?

X-Q. 292. Try it again, the gains, and see if they aren't $1,680,000, roughly. A. Yes, that is approximately right.

X-Q. 293. And the net result, then, of the whole enterprise? A. The net result of the whole enterprise is apparently a loss of about $80,000.

X-Q. 294. Now, you know what we have just done, don't you? We have really on the stand and somewhat labori-

ously constructed a consolidated net income picture of the whole enterprise, haven't we? A. As shown by the books.

X-Q. 295. And we have come out with a figure of some $80,000 of loss? A. Yes, sir.

X-Q. 296. Now, let me turn to another matter for a moment. You understand, of course, as an expert that the Maine Company's income is whatever it chooses to have within the limits of what the subsidiaries produce, do you not? A. I should say that is substantially the case.

X-Q. 297. It can order it pushed up or held back as it chooses? A. Yes.

X-Q. 298. And you also know from your study of the case, that in '33 the Maine Company ordered a lot more pushed up than was actually earned in that year, don't you? A. More than what is actually shown on the books here.

X-Q. 299. Right. And that is what I am talking about. A. Yes.

X-Q. 300. I want you to talk about those. A. I am talking about those figures, yes; that you mentioned.

X-Q. 301. Right. Now, when we construct a consolidated net income sheet of the whole enterprise, we find a loss in 1933 of $80,000; don't we? A. According to the figures we have used, yes.

X-Q. 302. And they are accurate, aren't they? They are from the exhibits and from the stipulation and the exhibits attached to it. A. They are accurate in the sense they are from the stipulations, yes.

X-Q. 303. You always assumed that the stipulation was accurate, haven't you? A. I have assumed the stipulation was accurate.

X-Q. 304. Yes. Now, let me ask you this: In a year when the whole enterprise was in the red to the tune of $80,000, do you, as an expert, say that gains and profits were unrea-

sonably accumulated in that year? Just "yes" or "no." A. In spite of the figures that are here—

X-Q. 305. I just said: Will you tell us "yes" or "no" in spite of what I have given you, do you say the gains and profits of the whole enterprise were unreasonably accumulated in that year?

Mr. Pierson: I object to that, Your Honor. These are nothing more than adjusted figures which he has compiled here on the stand. It seems to me it is so far hypothetical we have stipulated the facts in here; and they show what is in the stipulation, and it seems we are getting so far afield that it is objectionable.

The Member: I will overrule the objection.

X-Q. 306. (By Mr. Welch): Do you want that question read again? A. Read it again.

X-Q. 307. Because I would like you to study it sufficiently so you can answer it "yes" or "no."

(Question read.)

A. In spite of the figures that are here, I would say yes.

X-Q. 308. You will say "Yes"? A. Yes.

X-Q. 309. Now, I want to take up with you the single subject that I have left, and that is this question of refinancing in 1940. First, I will ask you if you agree with Dr. Merriman that we ought to get the Jersey Company out of the way? A. I think on the whole that would probably be a reasonable and probably a desirable move, but an unnecessary move.

X-Q. 310. And a what? A. But not a necessary move.

X-Q. 311. Well, it is necessary to take some move, isn't it? A. Oh, yes.

X-Q. 312. You have either got to let it die or prolong it some way? A. I am not entirely convinced that those are the only alternatives.

X-Q. 313. You think there is a third alternative in addition? A. Wait a minute.

X-Q. 314. To let it die or prolong it, do you? A. Yes.

X-Q. 315. Well, tell us this third alternative. I am puzzled. A. I think that another corporation under the laws of another State might be set up to take over the business of the New Jersey Company.

X-Q. 316. In that event, this one dies, doesn't it? A. In this case it does, yes.

X-Q. 317. Well, now, let's not be silly. Aren't there two alternatives: Keep it alive or let it die? A. All right, yes.

X-Q. 318. And not three, as you started to tell me? A. Yes. Very good.

X-Q. 319. All right. Now, let's take the keep-it-alive alternative for a moment. A. Yes.

X-Q. 320. Have you observed what the voting rights of the classes of stock are? A. Yes.

X-Q. 321. Preferred has full voting rights? A. That is my understanding.

X-Q. 322. The Maine Company owns practically none of it to date? A. The dates down to the year 1933, yes.

X-Q. 323. And you know the necessary vote that both classes of stock— A. I believe so.

X-Q. 324. —to extend alike? A. Yes.

X-Q. 325. Well, the Maine Company at the end of '33 was in no position to extend the life of the Jersey Company, was it? Just "yes" or "no." A. Yes, it was.

X-Q. 326. It was? A. Yes.

X-Q. 327. It was by virtue of the fact that it had funds enough to acquire or retire the preferred; is that what you mean? A. No, not necessarily.

X-Q. 328. Do you mean to say that as the holdings of stock stood in 1933 the Maine Company could march into a stockholders' meeting and control the destiny as to whether or not the Jersey Company should be extended? A. Not on the basis of its holdings at that time.

X-Q. 329. And if it controlled the destiny of the Jersey Company in 1940, some more remained to be done between 1933 and 1940; didn't there? A. Yes.

X-Q. 330. And what remained to be done required funds, didn't it? A. In order to prolong the life of the Jersey Company?

X-Q. 331. Yes. A. Not necessarily.

X-Q. 332. Well, funds are required to do something about the preferred in order to control the destiny of the Jersey Company, are they not? A. Not indispensable.

X-Q. 333. Once again you have told me that if the Maine Company marched into the Jersey stockholders' meeting as the situation stood in '33, it could not control the destiny of the Jersey Company; didn't you? A. That is on the holdings of stock as existed.

X-Q. 334. Now, the way to control the destiny of the Jersey Company is to increase the Maine Company's holdings in the stock that may vote when the question comes; is it not? A. That is one way.

X-Q. 335. And that one way takes money? A. That way takes money.

X-Q. 336. I have been questioning you now along the line that money was required to control the destiny of the Jersey Company in 1940 if its life were extended; haven't I? A. Yes.

X-Q. 337. Would you quickly say to me it is preferable to wind up the Jersey Company? You would, wouldn't you? A. It seems to me that of the alternatives it would probably be wiser to but not indispensable to.

X-Q. 338. Wiser? A. Yes.

X-Q. 339. Any director of the Maine Company who planned on liquidating the Jersey Company in 1940 would seem to you a wise director? A. On the basis of the facts as I know them now, yes.

X-Q. 340. Yes. Now, I take it that it is your opinion that as the 1940 crisis approaches it is highly desirable to have a considerable sum of cash available; do you not? A. It is not necessary.

X-Q. 341. I didn't say "not necessary"; I said "highly desirable." A. If I were to go along on my choice, I would say "no."

X-Q. 342. You don't think it is highly desirable to have any cash available as you approach it? A. That wasn't the question.

X-Q. 343. Well, let's start over again. Do you think it desirable that the Maine Company should have in its stock a substantial amount of cash as the 1940 crisis approaches? A. I ask you to define what you mean by "substantial." It is a rather elastic term.

X-Q. 344. Well, you just take any old meaning you would like, the smallest meaning you can possibly apply to "substantial" and tell me if you don't think the Maine Company should have a substantial sum of cash in the sock as 1940 approaches.

Mr. Pierson: I object to that, Your Honor. I think that the question should be put to the witness as to the amounts so that we will know what he means by "substantial."

The Member: Overruled.

Mr. Pierson: Exception.

The Member: If the witness wants to define the word as he uses it, he may do so, because he has been given the utmost latitude to use the word in any sense that he wants to use it. It is only important that we should know in what sense the witness is using the word.

A. Well, if I were to use the word "substantial" in the sense of the amount of cash which was in the treasury of the Maine Company at the close of 1933, I would say I would not think it desirable. If you mean by a substantial amount

of cash an amount sufficient for ample current operations of the company, I would say yes.

X-Q. 345. (By Mr. Welch). So you think— *A.* There is a great difference between those two amounts.

X-Q. 346. To use the vernacular, you think that by the end of 1933 the Maine Company was already too well heeled for the 1940 crisis? *A.* Using the vernacular term is—

X-Q. 347. Well, that may come from Iowa. Let's strike that out. You think that as of the end of 1933 the Maine Company had too much cash as it looked forward to the 1940 crisis? *A.* I will say yes.

X-Q. 348. You will say yes. Now, will you attend a little directors' meeting with me at the end of 1933 while we discuss that? Would you mind that? *A.* I will be delighted.

X-Q. 349. We come in and meet as we did yesterday, and I say, "Dr. Atkins, I just heard on the street that you think we have got too much cash to meet our 1940 crisis; is that right?" And you say "Yes." Let's assume that; will you? *A.* Yes.

X-Q. 350. Let's assume that I say to you, "Doctor, when you said that had you been thinking about the awful tough times we have been going through?" And you said "Yes." Will you assume that? *A.* Yes.

X-Q. 351. And suppose I say to you, "Doctor, how in the world can you tell what 1940 is going to be like, seven years from now?" Will you assume that? *A.* Yes.

X-Q. 352. And will you also assume that I say to you, "Dr. Atkins, I love this company. I want to leave it free of debt in 1940. I have steered my ship by that course since 1911. Won't you consider that as we talk about how much cash we are going to keep?" Will you assume that? *A.* Very well.

X-Q. 353. And suppose I also say to you, "I don't know

how the bankers are going to act in 1940." Will you assume that? A. Very well.

X-Q. 354. And will you also assume that I would say this to you: "Dr. Atkins, I am no one to think. I know if we have got cash to pay our debts we can step up to the counter in 1940 and pay them and we have nothing to worry about." Will you assume that I said that? A. Yes.

X-Q. 355. Now, if after having said all that to you, I stood pat on the proposition that we did not yet have too much cash, would you say, "Mr. Welch, you are just unreasonable"? A. I am to make my answer simply on the assumptions that you have stated to me?

X-Q. 356. Yes. A. And nothing else? Purely a hypothetical question?

X-Q. 357. Yes. A. I would still say yes.

X-Q. 358. You would say I was just unreasonable? A. Yes, on those assumptions.

The Member: It is hard to hear you. What was that last part of the answer?

(Read as follows: "Yes, on those assumptions.")

The Witness: I am answering strictly a hypothetical question.

The Member: Yes, I understand, but I want to hear what you say.

The Witness: Yes, sir.

X-Q. 359. (By Mr. Welch). You insist that it is unreasonable to want as much cash as this concern had in 1930 as it walked down the road toward that crisis in 1940? A. Once more this is strictly a continuation of a hypothetical question? I will say yes.

X-Q. 360. Unreasonable? A. Yes.

X-Q. 361. Now, what you want to do is to arrive in 1940 with some cash and go out some way and borrow the rest that is needed, don't you? A. That is not the entire story.

X-Q. 362. But that is the heart of it? You want to arrive in 1940 with some cash and hope you can go somewhere and borrow the rest, don't you? *A.* That is part of it but you are leaving out to my mind an extremely important part.

X-Q. 363. Well, now, I hope I am not stupid. When the 1940 crisis arrives, plenty of money in some sort is going to be needed, isn't it? *A.* Yes.

X-Q. 364. And you are going down the road with me to meet the crisis, aren't you? *A.* Yes.

X-Q. 365. As I understand you, you want to arrive at the cross-roads with some cash in one hand; that is right? You do, don't you? *A.* Yes.

X-Q. 366. And with the hope in the other hand that by borrowing you can get the additional sum you need; is that right? *A.* I should call it more than a hope.

X-Q. 367. Yes, but maybe I am a little conservative, and I say it is hope. *A.* All right.

X-Q. 368. Now, that is how you want to arrive in 1940; isn't it? *A.* What is more, you are leaving out to my mind some important considerations:

X-Q. 369. Well, I didn't ask you considerations you are going to arrive with. I asked you what you are going to have in one hand and what you are going to have in the other. *A.* All right.

X-Q. 370. Now, in this hand— *A.* You are leaving out certain important assets, then.

X-Q. 371. All right. I am going to give you your head in a moment even if you slay me. In this hand you are going to have cash, aren't you? *A.* Yes.

X-Q. 372. Now, just help yourself and fill up this other hand with hope plus anything you think of. What will you put in your other hand? *A.* I will put in the other hand if I have been able to do what I wanted to do during this period —may I conclude that?

X-Q. 373. Sure. I said I would give you your head. A. I would arrive there with a very substantial part of the outstanding securities which are maturing in 1940.

X-Q. 374. Yes, but if you do that you have got an awful lot less cash over here in my left hand, haven't you? A. Yes.

X-Q. 375. So that doesn't make much sense, does it, Doctor? A. Yes.

X-Q. 376. Suppose we went down the road, you and I together, for 1940, and you had this hand full of Jersey securities instead of cash, and no cash. Do you follow me? A. Yes.

X-Q. 377. Still you would have to have in your right hand a good large gob of hope, wouldn't you? A. Yes, if you phrase your question that way.

X-Q. 378. Now, Doctor, when we sit in our directors' room, and you tell me that you want to go down with a hand full of cash or Jersey securities and another hand full of hope, and I say to you, "Dr. Atkins, let's go down the road with both hands full of cash." A. Yes.

X-Q. 379. Do I just sound utterly unreasonable to you? A. Yes.

X-Q. 380. Now, just one other thing, Doctor. You don't think an industry like this just because it has been in debt for 50 years has always got to be in debt, do you? A. I don't know that it is indispensable, no.

X-Q. 381. It isn't even desirable, is it? A. You used the word "always," did you?

X-Q. 382. Yes. A. I am a little bit concerned over using such an expression as "always." But, if I may, I can see no reason why it should not continue for a considerable period of time with a certain amount of debt advantageously.

X-Q. 383. Let's face the question, Doctor. You don't think it should always remain in debt, do you? A. Using that in

the strict sense of "always" as a limitless time, I would say no.

X-Q. 384. Well, you don't think it should remain in debt another half century, do you, Doctor? A. I see no reason why it shouldn't.

X-Q. 385. But if you owned it—just think along with me—if you owned it and it had been in debt for half a century, wouldn't you feel awfully good if, say, in 1940 you got all of the debts paid? A. Not necessarily.

X-Q. 386. Well, don't you think you would feel better? A. Not necessarily.

X-Q. 387. Now, wait. May I finish the question? A. You may.

X-Q. 388. Don't you think you would feel better in 1940 if you had all the debts paid than you would feel after all the half century you still owed, say, 15 millions of dollars? A. No, sir.

X-Q. 389. So you are just as happy when you are in debt as when you are out of debt; is that right? A. It depends on the circumstances.

X-Q. 390. Yes, but normally speaking you are just as happy when you are in debt as when you are out of debt? A. I can't answer that in general terms. I would say it depends on the circumstances.

X-Q. 391. Do you own a house, Doctor? A. I do not.

X-Q. 392. Suppose you owned a house, just for the moment, and you and your wife and family of whom you are fond lived in it. A. Yes.

X-Q. 393. And that you liked it. A. Yes.

X-Q. 394. And suppose there was a mortgage on it. A. Yes.

X-Q. 395. And suppose it was due in 1940. A. Yes.

X-Q. 396. And suppose you realized you could go down the road to 1940 with cash to pay the mortgage. A. Yes.

X-Q. 397. Or that the alternative was you could go down with just a little cash and hope that you could place the mortgage again. *A.* Yes.

X-Q. 398. Wouldn't you think that it was perfectly reasonable to want to pay your mortgage off in 1940? *A.* Not necessarily.

X-Q. 399. Do you think it would be unreasonable to want to pay off? *A.* That depends on the circumstances.

X-Q. 400. Well, just think of any circumstances you want to, and don't you think that it would be far from unreasonable to have a desire to have your house free of a mortgage? *A.* Not under all circumstances. There are circumstances when I think that would be very desirable.

X-Q. 401. And under those circumstances you would feel kind of good in 1940 if you had the mortgage off of the old homestead, wouldn't you? *A.* Not necessarily.

Mr. Welch: All right. That is all.

Redirect Examination.

Q. 402. (By Mr. Pierson). Dr. Atkins, you were asked on cross-examination with regard to your opinion as to whether the Maine Company was other than a holding company, and in that connection are there any other factors other than those directed to your attention by Mr. Welch as to the reasons why you consider it to be a holding company? *A.* Yes, there are.

Mr. Welch: This is something not brought out on direct that you now wish to add?

Mr. Pierson: Yes, this is redirect.

Mr. Welch: I thought you were going to ask for something that you should normally have brought out on direct and which was not. I don't much care.

Go ahead.

A. As I have examined the facts in this case, it seems to

me that this whole enterprise is in a very large measure the expression of Mr. Prince in various ways. I find that Mr. Prince in the early years was the only stockholder, and later was the important stockholder. The remainder of the stock of the Maine Company was held by F. H. Prince & Company, Inc. That stock, in turn, was held by the Prince trust of which, I believe, Mr. Prince was a trustee, and from which he had proxies to vote the holdings of the stock.

I find that Mr. Prince was president of the Maine Company; that he was president of the New Jersey Company; that he was a chairman of the Board of the Transit Company; that he was president of the Railroad Company; that he was a trustee of the Central Manufacturing District trust; that he was the principal partner in F. H. Prince & Company, the brokerage house. Perhaps he held additional positions as director of some of the other companies. But almost everywhere we turn we find Mr. Prince appearing. When I add to that the relatively small amount of time when Mr. Prince must necessarily have given to the affairs of this company, according to the income tax returns, it seems to me that when the various matters that came up to be decided, they were decided primarily by Mr. Prince as a man, and that he performed the various acts that were necessary to accomplish his desires in whatever position seemed appropriate to perform those acts, and, so far as I can see from this Maine Company, it was a repository of the securities and cash and a source of loans to him and his brokerage house.

When I add all those facts together, I am impressed very definitely that the function of the Maine Company was not managerial in character but was simply that of a holding company.

Mr. Welch: Was Your Honor about to say something?

The Member: I will hear you.

Mr. Welch: I was going to move to strike it on the ground that it is simply a re-hash of what he said on direct, and not appropriate redirect examination.

The Member: Well, I will deny the motion but I admonish counsel to the effect that redirect is not for the purpose of repeating what has been said on direct, and I can take nothing from what the witness has said in his answer which has not already been said on direct. You can't let this go on interminably. We will suspend now until a quarter after two.

(Whereupon, at 12:45 o'clock p. m., a recess was taken until 2:15 o'clock p. m. of the same day.)

AFTERNOON SESSION.

The Division resumed hearings at 2:15 o'clock p. m., whereupon the following proceedings were had:

Mr. Clark: By agreement with Counsel, Your Honor, Mr Merriman will take the stand first relative to the chart.

The Member: Mr. Atkins is still to resume?

Mr. Clark: Yes. Mr. Merriman is most anxious to get a train.

Will you take the stand, please.

MR. NORMAN MERRIMAN

having heretofore been sworn, was recalled to the stand and was examined and testified as follows:

Redirect Examination.

The Witness: If Your Honor please, it might be advantageous if I were to put this chart on this easel.

The Member: This testimony is testimony to be limited to what I started the other day about this exhibit four times R?

Mr. Clark: Well, it is relative, yes, to what Your Honor started at that time. I understand the witness will give evidence as to what it represents.

The Member: Yes, but I mean to say that is the whole content of this testimony?

Mr. Clark: Yes.

The Member: You are not attempting to go beyond that and into something else?

Mr. Clark: Oh, no.

The Member: All right.

Mr. Clark: Unfortunately, this having been prepared so rapidly, we have no copies, but we will have other copies made. Of course, the record shows Mr. Merriman has been previously sworn.

The Member: Oh, yes.

Mr. Clark: May I proceed, Your Honor?

The Member: Yes.

Q. 442. (By Mr. Clark). Mr. Merriman, you prepared this chart? *A.* It was prepared under my direction.

Q. 443. And from what data was it prepared? *A.* It was prepared from data contained in the stipulation. The blue columns—

Q. 444. Just a moment. I just asked you from what data it was prepared. Anything aside from the stipulation? *A.* No, sir.

Q. 445. Now, what does it purport to represent? Just describe it for the Board. *A.* I should amend that. It was prepared from the stipulation and from Exhibit 45, Petitioner's Exhibit 45.

Q. 446. You mean from 45, or with relation to 45? *A.* With relation to 45. The red columns in the chart represent the difference between the red and blue columns which are shown on Petitioner's Exhibit No. 45. Petitioner's Exhibit No. 45 shows the amount of long-term liabilities of the Maine

Company and its subsidiary and affiliated companies. The blue columns represent what, for lack of any better term, I might call the liquid assets. The difference between those two is what I would term the financial problem of the company over and above its cash and other quick assets. That difference has been calculated and has been presented on this chart as the red columns, and in the early years of the period the top of these columns shows that that financial problem that this company must meet or refinance in some way in the future is about $30,000,000.

The Member: Tell me, is this correct, Mr. Merriman, that looking at chart No. 45, the tops, the curve representing the top line of the blue columns of Exhibit No. 45 represent the bottom line of your red columns in the chart you are now considering?

The Witness: Yes, sir.

The Member: Is that correct?

The Witness: That is correct.

The Member: So that this would be a straightened-out line representing the tops of the blue columns?

The Witness: Yes, sir.

Now, the blue columns in this chart represent the annual income of the Maine Company, taken from S-51, and capitalized at 10 percent; in other words, it is the value of that company's income, on the assumption that 10 percent is a proper rate to capitalize it at; so that in the early years of the period this company had a financing problem that, in my judgment, was very great. In the late years of the period the blue columns had risen so high above the red columns that, in my judgment, it meant that the financing problem was not a serious one at all. That is what I endeavored to show in a very hasty way in the chart that was previously introduced into evidence, and it was clear to me although I judge it was not clear to anyone else in the courtroom.

The Member: I am only asking these questions for the purpose of getting clear in my own mind. If I ask anything that either side thinks is objectionable, I trust you will make your objection.

Looking at your Exhibit RRRR, which is the exhibit you offered as part of your testimony the other day, I am a little concerned, puzzled, at least, with the fact that the blue line which you put on Petitioner's Exhibit 45 the other day for the years from 1914 to 1921 is lower than the tops of the blue columns shown on Petitioner's Exhibit 45.

Mr. Clark: Your Honor, may I interrupt?

The Member: Let me finish the question and then before he answers I will let you interrupt all you want to.

While the exhibit you are now considering on the stand before you shows a red column and a blue column, which in each instance of those years is above the line which you have said represents the same line as the tops of the blue columns of Exhibit 45.

You understand what I am referring to? And if you understand it, just say so, and stop before you answer it, and if you don't understand it, then stop. Mr. Clark wants to say something.

The Witness: Might I see this, Your Honor, for a moment?

Mr. Clark: If Your Honor please, my interruption is quite innocuous in character. I was thinking that we hadn't marked this for identification and there is no way of its being identified in the record.

The Member: That is true and perhaps it had better be marked, although I don't think there will be any difficulty about it now because it is the only exhibit we have been talking about since the reconvening after the luncheon recess.

Mr. Clark: I know but there are times when that question comes up.

The Member: Let it be marked.

Mr. Clark: Mark it for identification, and I will offer it later.

The Member: What will that be? Four times V?

The Clerk: WWWW.

The Member: Now, do you understand me, Mr. Merriman?

The Witness: I am not quite sure that I do, Your Honor.

The Member: Well, now, am I correct in my understanding that the exhibit which is now marked WWWW is supposed to portray the same thing, that is, to convey the same ideas to the mind as your Exhibit RRRR?

The Witness: Not exactly but nearly so, Your Honor; nearly so. I endeavored to simplify the exhibit by having only two sets of figures for comparison instead of having three, and, therefore, there is no reference in Exhibit WWWW to the amount of the quick assets that are available to meet this company's ultimate obligations. The only place where they appear is that the length of the red columns in WWWW is the excess of the long-term liabilities over the total of the cash assets which are represented in the blue columns in Petitioner's Exhibit 45.

The Member: Well, now, if you will get over there a minute, so that we can be talking about the same thing. Just look at your column and I am taking this just haphazardly, of 1919. Have you got it?

The Witness: Yes, sir.

The Member: Well, now, the column for 1919 shown on Exhibit 45, and which also appears as the basis of your RRRR shows a red column which gets up to approximately 33 million?

The Witness: Yes, sir.

The Member: And it shows a blue column which gets up to probably 5½ million.

The Witness: Yes, sir.

The Member: And I take it, or I have understood that on your Exhibit WWWW, your red column is accordingly to scale, the length of the difference between the 5 million plus of the blue column of 45, and the approximately 33 million of the red column of 35, or somewhere around 27 or 28 million; is that correct?

The Witness: Yes, sir; that is correct.

The Member: Now, the thing that I am puzzled about is that on your Exhibit RRRR you have a rough blue pencil line which was the purpose of your Exhibit RRRR.

The Witness: Yes, sir.

The Member: Which doesn't even reach into the realm of the excess of the portion of the red line over the portion of the blue line; that is, bar, I mean, column. I can't quite reconcile the theory of WWWW or Exhibit RRRR with what you have said, namely, that it represents only such part as is in excess of the blue column, because on RRRR your red pencil line is below the top of the blue column, so that I would have thought your Exhibit WWWW would show no blue column whatever because there isn't on RRRR which is in excess of the quick assets which are shown on Petitioner's Exhibit 45.

The Witness: Yes, sir.

The Member: That is what puzzled me the other day, and that is what still puzzles me.

The Witness: S-51 for the year 1919 shows that the net income of the Maine Company for that year was $391,000, and, charted on that scale, it is naturally on the scale of it —it is naturally a positive figure. It bears no relationship to the blue column of Exhibit RRRR at all. That is a figure of quick assets, and this is a figure of capitalized income,

and the capitalized income for 1919 shows, as I would read it off the chart, about $400,000, actually—about $4,000,000; actually $3,917,000 on the basis of S-51.

The Member: Something more, Mr. Clark?

Mr. Clark: Nothing with relation to Mr. Merriman, Your Honor.

Do you have something?

Mr. Welch: Maybe.

Recross-Examination.

X-Q. 447. (By Mr. Welch). Mr. Merriman, just one or two questions. You can stay right here. I will be very short.

Mr. Clark: Oh, let me see, Your Honor, at this time offer this in evidence.

The Member: Is there objection?

Mr. Welch: I do not think I should. I think we better have it in.

The Member: It will be marked. We will mark it in a moment as Respondent's Exhibit WWWW, as it is now marked for identification.

X-Q. 448. (By Mr. Welch). I understand this chart, and you will help me if I don't. What you have done, as I understand it, is to make a picture in the red columns of the job that confronted the Maine Company by 1940; is that right? A. Yes, sir.

X-Q. 449. And then, as you thought about the job that confronted you, you made a blue column, which is ten times the earnings of the Maine Company, so that you could look at that as you studied your problem? A. That is exactly it, sir.

X-Q. 450. You heard Dr. Atkins testify this morning, when I had him going down the road with cash in one hand and hope in the other? A. Yes, sir.

X-Q. 451. And I think it is your feeling that if he has

cash in one hand and hope plus your chart in the other he will be even more hopeful; is that right? A. I do not call earning power hope.

X-Q. 452. I know, but that is what you are talking about. You are talking about refinancing. You think a picture of your earning power through the past makes you feel more hopeful about refinancing, don't you? A. More confident.

X-Q. 453. More confident. A. Yes.

X-Q. 454. That is all right.

Now, just one other thing: You heard Dr. Atkins on the stand spell out for us this morning the net income of the enterprise, didn't you, in the year 1933? A. Yes, sir.

X-Q. 455. And that was below zero? A. That method of spelling it out reduced it to less than zero.

X-Q. 456. Now, you have contrasted here the obligations of the parent and the subsidiaries— A. Yes, sir.

X-Q. 457. —on the one hand against the net income of the parent only. A. That is correct, sir.

X-Q. 458. This morning Dr. Atkins constructed for us the net income of the enterprise, you remember, for 1933, and got a zero figure. A. The constructed net income did not give consideration to non-recurring losses, as I understood it.

X-Q. 459. Right. So that if, just in the year 1933, we made a blue column to make us feel hopeful as we went down this road, based on the net income of the enterprise consolidated, we just would not have any blue column at all, would we? A. If we use those book figures, we would not.

Mr. Welch: That is all.

Mr. Clark: That is all.

(Witness excused.)

The Member: Now, will you mark the exhibit.

(The document so offered and received in evidence was

marked "Respondent's Exhibit WWWW," and made a part of this record.)

DR. PAUL M. ATKINS

having heretofore been sworn, was recalled as a witness for the Respondent and was examined and testified as follows:

The Member: Mr. Pierson, the witness is yours, I think.

Mr. Pierson: Yes, Your Honor. I have just one or two more questions and I will finish.

Redirect Examination.

Q. 460. (By Mr. Pierson). Dr. Atkins, in response to Mr. Welch's questions this morning I believe you referred to the fact that you were using Exhibit D rather than S-52. *A.* Yes, sir.

Q. 461. Will you state why you used Respondent's Exhibit D rather than S-52? *A.* Because Exhibit D represents the same material that was contained in another exhibit referred to, corrected to accord with the changes which are stated in the stipulation itself.

Q. 462. From your experience, would you say that the destiny of the New Jersey Company could be controlled without ownership of the preferred stock within the enterprise? *A.* Yes, sir; I would say it could.

Q. 463. Will you state your reason for that answer? *A.* Because I see no reason why it would not be reasonable to anticipate any possibility of acquiring proxies from holders of the preferred stock of the New Jersey Company.

Q. 464. From your experience, Dr. Atkins, how would you think the New Jersey Company could have been refinanced without incurring debt? *A.* I think the New Jersey Company could have been refinanced without incurring debt by an issue of preferred stock.

The Member: You mean in 1940?

The Witness: Yes, sir.

Q. 465. (By Mr. Pierson). I believe you stated in response to Mr. Welch's questions this morning that there was a book loss of, I believe it was, approximately $80,000; is that correct? A. That is correct, sir.

Q. 466. Now, do you consider that the showing of a loss on the books of this amount for 1933 is a fair statement of the results of the operation of the companies in the group for that year?

Mr. Welch: Well, it seems to me that is just so adamant, as a matter of fact, that we have to take it.

The Member: Well, that is argumentative. There is apparently a reasonable question as to whether the books are the criterion for a judgment.

A. No, I don't think that the loss which I computed under Mr. Welch's guidance this morning from the book figures of the incomes of these companies is a sound basis for forming an opinion in regard to the financial position and the true earnings of that group of companies for the year, because I find that there are certain non-recurring losses, which I feel, ascertained in that year, were not due strictly to the operations of that year alone.

I find, for example, the Produce Terminal, there was a loss of what appears to be of that kind, a sum of $311,000, and the Transit Company, another loss, which appears to be of the same type, of $2,213,000, or a total of $2,525,000; and I believe there are other losses of that same type, which I don't have a chance to look up.

Giving consideration, however, to those two items and the figure this morning would give earnings for the group of companies for the year in question to something over $2,400,000, which, to my mind, is representing the true earning power, rather than does the figure of $80,000 loss.

Mr. Pierson: That is all.

Recross-Examination.

X-Q. 467. (By Mr. Welch). Just one little thing. You come from New Jersey, don't you? *A.* Yes, sir.

X-Q. 468. Can you tell us from your experience what it would cost the New Jersey Company in personal property taxes to remain in business with a domiciliary situs in Jersey City? *A.* I cannot say that.

X-Q. 469. Would you have any reason to doubt my statement that it would cost $1,125,000 a year to do that? *A.* It would seem rather excessive.

X-Q. 470. But have you any real reason to doubt it? *A.* Of my own knowledge, no.

Mr. Welch: Nothing further.

Q. 471. (By the Member). I am interested in your statement: You say that the books are not a reliable criterion for appraising the future needs—using it as a basis for the exercise of judgment—for the future conduct of the business; is that correct? *A.* The book figures stated in the exhibits I do not feel are always a sound guide. Testimony has already been introduced in this case indicating that in 1932 there was a large non-recurring item of income, something in excess of $2,000,000, and here in 1933—

Q. 472. Do you mean the re-weighing charge item of the Transit Company? *A.* Yes, sir; taken on the books of that year.

Q. 473. Yes. *A.* And here we have two losses, which, so far as I can learn, are not regularly recurring losses which were ascertained and entered on the books. I do not mean in any sense to infer that the books were not accurately and properly kept, but from the point of view of forming an opinion with regard to the earning power of the corporation, I feel it is necessary to give consideration only to the normal and regular expenditures and sources of income.

Q. 474. Now, that is what you said, I thought, in answer to Mr. Pierson's question just a minute or so ago, but in addition to that, you said that not only were there two non-recurring losses which you found, and this non-recurring gain which you found, but you said something to intimate that you thought there might be other non-recurring items which you had not yet been able to identify. Am I correct in that? *A.* Well, I mean to intimate that simply in the time that I had this morning I had not an opportunity to search the record to ascertain whether there are or not.

Q. 475. Well, I want to know whether your view that the books are not a reliable criterion for judgment is based upon the three items which you have expressly enumerated of non-recurring amount whether on the loss or the gain side, or whether it is based upon those three items which you did find, and a thought that there are perhaps other items which you didn't find. *A.* Well, now, I am not entirely certain that I thoroughly understand your question here. I am dealing here with—

Q. 476. I will have to make it clear again: I am speaking only with regard to your answer to Mr. Pierson, and if I misunderstood that answer then everything that I am saying now has no foundation, but I did understand you to say, I thought, that there were not only two non-recurring loss items, and one non-recurring gain item, but that there were other non-recurring items or possibly other items which in the short time you had to give to it you had not been able to ascertain. *A.* Yes, sir.

Q. 477. Now, if your thinking is predicated upon a possibility of errors in the books or bad theory in the books which is to be found elsewhere than in the three items you have enumerated, it is important that we should know what it is that forms the predicate for your feeling that the

books are not the proper place to go for the ascertainment of the data upon which the directors or your own judgment is as to future conduct should be predicated. A. May I clear up those—try to clear up those questions step by step, perhaps not in the same order?

In the first place, in regard to the keeping of the books according to sound theory and in an accurate manner, I have no question whatsoever in regard to the accuracy of the books or in regard to the soundness of the theory on which those books were kept. But from my experience, I believe, that oftentimes it is necessary to seek in the books the information which is needed for specific purposes. The same information is not always in the same form for the same purposes.

Let me take an illustration entirely aside from this case. Suppose, for example, that a loss was sustained in the year 1935, which was not ascertained in the exact amount until the year 1936, and was not taken into the books until 1936 of that company. It is a loss which has to be written down. One way would be to charge it directly against the surplus of the company and not show it in the operations of the year 1936. Another way would be to show it in the operation of '36 and so take it into a surplus. If we are studying the operations of this hypothetical company, it would depend on what purpose we wanted to use that information for which figure we would take. And that seems to me that in the case consideration has been given, on one hand, to the book figures as they stand without adjustment for two items which need consideration in determining the figures for the use which I had in mind when I made my statement. I do not know of any items which appear here, and these are the only two items that I have given any consideration to. I simply wanted to—there might be some other items that I don't know of because of the lack of

time, that I didn't give any consideration to them. It is just simply that I don't like to say "never" until I have had plenty of time to be absolutely sure as to the matter, Your Honor, but these items are two which I have been giving consideration to.

Is that—

Q. 478. Does the possibility that there are other nonrecurring items which have not come to your notice in the short time which you have had influence your judgment? *A.* No, sir; because I think the probability of other items is of no significance at all. It is so small that it would not affect my judgment in the matter.

Q. 479. You have no lurking reason for supposing that there are other items which should be accounted for or which would form a reason for your discounting the face value of the figures, have you? *A.* No, sir.

Mr. Pierson: That is all. Thank you.

Mr. Welch: Just one moment. I still have one other question. I think Mr. Green will tell me not to ask it.

(Mr. Welch and Mr. Green confer.)

Mr. Welch: I have gotten the forbidden negative that I expected.

The Member: You may stand aside.

(Witness excused.)

Mr. Clark: Dr. Friday, will you please take the stand.

DR. DAVID FRIDAY

called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. 1. (By Mr. Clark). Will you state your full name.

The Member: Perhaps I might suggest, Dr. Friday has been on the witness stand before the Board, and, more

particularly, before this division of the Board in the proceedings in which I have presided. I have heard his qualifications stated at great length, so that I, myself, am familiar with the witness' history. I suggest that only for the purpose of shortening the qualifications, if the Petitioner's Counsel are not insistent upon a full statement of them again. But that is merely a suggesting of a way of shortening it, and I shouldn't use any pressure at all to insist upon its being done.

Mr. Clark: We are approaching the end, Your Honor, and I think we all want to get through.

Mr. Welch: I will make it still shorter, if you will tell me what points his opinion will be offered for, I will no doubt quickly admit his qualifications.

Mr. Clark: Whether this is a holding or investment company. When I say "this" I mean the Maine Company. Whether it accumulated gains or profits during these particular years beyond the reasonable needs of the business. He will testify as to the fair market value of the New Jersey Company common stock which was held by the Maine Company in 1930, '32, and '33, and then give an opinion as to the advisability of the Maine Company accumulating a large amount of gains and profits for the retirement of the New Jersey Company bonds in 1940.

Mr. Welch: That sounds like No. 2 over again, which was accumulating beyond the reasonable needs.

Mr. Clark: Well—

Mr. Welch: In any event, I admit his qualifications.

The Member: I suppose if anybody wants to know his qualifications he can look in the transcript of the testimony before the Board in five or six cases, Dr. Friday, in which you have stated them?

The Witness: Yes, sir.

The Member: What cases are they?

The Witness: My first—

The Member: The First was the Couzens case?

The Witness: The first was the Couzens case in 1927. The next one of consequence was the Bok estate, Edward Bok estate involving the valuation of the Curtiss Publishing Company. The next after that was—there were two cases in which I testified for the Government, the Hoover Vacuum Cleaner—the Hoover estate valuing the estate of the Hoover Vacuum Cleaner stock. That was in the spring of '37. And in the spring of '38 the Maytag Company stock valuation for gift tax purposes. I have testified within the last month as to the value of the stock in the Philadelphia Enquirer, a Philadelphia newspaper, that is. The Emerald Coal case.

The Member: What case was the Philadelphia Enquirer case? Do you know the name of the case?

The Witness: I believe it was Philadelphia Enquirer Corporation against the Commissioner.

The Emerald Coal case, which was a year ago.

The Member: That was the Walker Estate case?

The Witness: That was the Walker Estate case; yes, sir. And the W. C. Rand case. That was about '35, as I remember it.

The Member: Some of those cases you have testified as an expert witness for the Government, and in others you have testified as an expert witness for the taxpayer; isn't that true?

The Witness: Yes, sir; two of them for the Government and the others for the taxpayer.

The Reporter: I don't believe we have your name yet.

The Witness: David Friday, and I reside at 4525 Garfield Street, Washington, D. C.

Q. 2. (By Mr. Clark). When did you first start an examination or start preparation for testifying in this case?

A. Some time early in December or late in November.

Q. 3. That was at my request? *A.* That was at your request; yes, sir.

Q. 4. Now, pursuant to that request, have you examined and your preparation in general—have you examined the stipulation of the facts and the exhibits attached thereto which have been filed with the Board in this case? *A.* Yes, sir; I have.

Q. 5. And examined the exhibits which have been introduced at the hearing by Petitioner and Respondent? *A.* I have, sir.

Q. 6. I don't suppose that you mean by that that you have gone through every line, but you have given consideration and cursory examination or such general and thorough examination as you thought proper? *A.* I have gone through the exhibits of the plaintiff pretty thoroughly line by line and a good deal of the other material.

Q. 7. You haven't been here at all the days of the hearing, but have you either heard the evidence or read the transcript of the record as to the testimony which has been introduced here? *A.* Yes, most of it. I think there are two or three of the witnesses for the plaintiff that I have not read.

Q. 8. Do you recall what witnesses those are? *A.* Mr. Donovan or Mr. McDonough. Which one is the assistant to Mr. Prince? I read his but I did not get time to read the other gentleman's.

Q. 9. Mr. McDonough, I think.

Mr. Welch: It is apparently Mr. Donovan that he did not read.

Mr. Clark: Oh, Mr. Donovan.

The Witness: Mr. Donovan.

Q. 10. (By Mr. Clark). Now, in the light of all this, and your special training and experience, have you an opinion

as to whether in the years, '32, and '33 the Maine Company was a mere holding or investment company?

Mr. Welch: I object. That is the familiar ground. I think I should object and I assume that I will be overruled.

The Member: I will overrule the objection.

Mr. Welch: And save my exception, please.

The Member: Re-expressing my doubt as to the efficacy of the testimony to be of any persuasive weight upon the issue. You may answer.

A. I am of the opinion that it is a mere holding or investment company.

Q. H. Well, now, will you state your reasons for arriving at that conclusion? A. Well, in going over such evidence as I have been able to gather on the matter, it appears to me that the only function of the Chicago Stock Yards Company, the Maine Company, that is, was to own stock, particularly the stock of the New Jersey Company, to receive dividends, to invest particularly those dividends in other securities, to receive the interests on those securities, and, in a general way, to manage the income from those securities in the acquisition of other securities. And that appeared to me, as I viewed the evidence, to be the function of the company.

I looked into the income tax return, particularly the consolidated returns of the New Jersey Company, and found the re—the several witnesses for the plaintiff have testified to it—that Mr. Prince was very active in these various subsidiary companies. And I saw among other things stated there over the signature of whoever made the return of this rather surprising fact, that he spent 58 percent of his time in one and 42 in the others, and part of his time in another, and such time as needed in the other. I didn't try to add that up. But it indicated very clearly that Mr. Prince was active in the whole of these stock yards com-

panies, and I knew of his activities in other fields. I have met him in the field in which he was interested.

I believe a company such as the company might have a research organization which devoted itself to accounting and statistical analysis and other problems with respect to the stock yards industry. It is a live stock industry and a very large industry. I know something about it. I was president of an agricultural college for two years. But pretty definitely, such work as was done there was done by Mr. Prince. That is, in stating here, in the survey of the pay roll of the company, he gets $50,000, and the treasurer gets five hundred, and there are two thousand dollars worth of other employees. From that I saw nothing to indicate that they were engaged in any activities other than those activities of holding and administering these stocks and revenues. And I formed the opinion that that was a holding or investment company.

Q. 12. Anything further you have to add? *A.* No, that is all I have to say about that.

Q. 13. Now, similarly, have you formed an opinion as to whether in these same years the Maine Company accumulated gains and profits beyond the reasonable needs of the business? *A.* Yes.

Q. 14. And what is that opinion? *A.* My opinion is that they did.

Q. 15. Will you state the reasons which led you to that opinion? *A.* Well, I studied this whole situation with all these figures of income and assets accumulated, and cash accumulated. I have listened to the testimony and read most of it. And it is clear that in trying to ascertain what are the reasonable needs, the thing that seems to be at the very center of the problem is what are the reasonable needs of the Maine Company, particularly in view of a

situation that it has—of these situations that it has confronting it in 1940.

It has been repeated here over and over that in 1940 the charter of the New Jersey Company expires, the bonds fall due. There are 14 millions of them. There are some $2,327,000 of Railroad bonds that the New Jersey Company guarantees the principal and the interest. They will have to be taken care of, and when the charter expires there are preferred stockholders entitled to receive $6,500,000 upon dissolution or sale or the customary phrase that is contained in the preferred stocks. That Mr. Prince is desirous of retaining control of this whole stock yards situation together with the Chicago Junction Railroad situation, and since because that is the chief source of his income, and of the income of the Maine Company, and since that is true, he naturally concerns himself certainly as an individual with the smooth handling of that management of that situation in 1940 in order that no untoward event may befall these companies or this industry.

Now, what are the reasonable needs of the company? What are the reasonable needs of the company in view of that? That is the way in which the question presented itself to my mind. The problem presented itself to my mind. I studied these figures and studied particularly this Respondent's Exhibit C, I believe, in which are set forth for the entire enterprise. I think that is right, isn't it? Respondent's Exhibit C? Behind the famous chart.

Mr. Welch: The basis of 45?

The Witness: Yes, sir.

A. (Continuing) Studied that and analyzed it and I got some help from that, I thought, on the problem. And there are set forth, first of all, the liquid assets of all these corporations, the Maine Company, and the New Jersey Company, and all their subsidiaries, and we have set forth in

that exhibit their cash, their notes receivable, their marketable securities, and we have also set forth the bonds and the debentures which all of the different companies combined own, the preferred stocks which are outstanding, and common stocks which are outstanding. That chart runs back to 1911.

I have taken off a tabulation here from this for convenience. Perhaps we ought to offer this in evidence? It would be more convenient to follow the tabulation, if I take this short tabulation, and follow it. This was prepared from (handing a paperwriting to Mr. Clark)—

The Member: Have you finished that sentence?

The Witness: I thought—

The Member: You said "This was prepared from —" and you stopped.

The Witness: This was prepared from Exhibit C, the figures appearing thereon.

The Member: Entirely?

The Witness: Entirely.

Mr. Welch: He seems to have left off of it the preferred stock of the New Jersey Company and the common stock, the requirements to retire that.

The Witness: Yes, sir. I was going to explain the situation. I thought this might help in elucidating it.

Mr. Welch: Certainly. I want to keep nothing from His Honor that will help a clear understanding of the case. I suggest that this be handed up to His Honor to follow as a chart, and if Your Honor would like it in evidence, it certainly should be in if you think it is a help. It is to be used as a chart of what the witness says.

4. (Continuing) On this tabulation there is set down in the first column a statement of the volume of bonds and debentures of the Maine Company and all the subsidiaries of this enterprise year by year. Those are merely bonds and

debentures and it does not contain the preferred stock of the New Jersey Company nor the common stock of any of the companies. These are the debts of the company that most of—most of it must be met in 1940.

And in the second column, cash, notes receivables, and investments of Maine Company and subsidiaries are set down, the assets as they appear in the exhibit, the liquid assets which may be and are either actual funds for use in the payment of the bond obligations when they become due, or assets which might quickly be converted into liquid funds. I also set down for convenience in the third column the actual cash. That is the part of the second column which consists of cash. That is set down in the third column.

I studied this chart particularly as of 1929. I may say that the whole of this tabulation discloses the dividend policy of the company in years gone by, to accumulate assets and liquidate assets in very considerable amount.

By 1929 there were outstanding at the end of the year bonds and debentures totaling $23,963,000, in various stages, but most of them due in 1940. The most that the company had accumulated and had on hand was $19,691,661 of liquidating assets, of which $11,510,000 were in cash.

The question that I asked myself at that point was whether at the end of 1929, which is the year just before 1930, the first year with which we are here concerned, there was an accumulation of liquid assets which met the reasonable needs of this business, the reasonable needs, as I gathered, being determined very largely by the fact that in 1940 a large number of these bonds became due, and the evident feeling that has been manifested here that at that time the New Jersey Company should be liquidated.

I have not found much difference of opinion among any of the witnesses. I have read their testimony on this point,

and I am in agreement that it should be liquidated in 1940. I am also of the opinion that it is not necessary that it should be liquidated in the sense that the company of that name should go out of existence; the charter might be renewed and extended; but in my opinion it would be best that it be liquidated.

Now, on the question as to what are the reasonable needs of the business, in view of that situation particularly, to me it appeared that at the end of 1929 the reasonable needs of this business for this purpose, for the emergency that confronted it in 1940, permitted the declaration of much larger dividends than any that had been declared theretofore, back to 1924, as I remember it, since which time they had declared 5 percent, or $400,000 a year; and that it was not necessary in 1930 to retain the amount that was retained in that year. The year 1930 had net income for the Maine Company of $2,968,363. Out of that the company declared $400,000 and the rest remained in the industry. That seemed to me to be retaining assets and earnings beyond the reasonable needs of the company, in view of what those needs were.

Now, I considered the matter thoroughly and decided that the most that could be set up, in my opinion, as reasonable needs was an amount which would enable the Maine Company to liquidate these bonds and debentures and pay the debts of the company in 1940, and that would require that $23,963,000, as is shown in the first column, that between 1930 and 1940 certain of the bonds that were outstanding here would have been paid off, particularly the Chicago Manufacturing District bonds, which are serial bonds, and, as I remember, the serial bonds would have extinguished this completely by 1940. But taking this figure of $23,963,000, if the company has that much money on hand in 1940, or assets which can be completely converted into money,

then it can pay them off, in which event the collateral behind these 14 million dollar face value of bonds of the New Jersey Company would be released. Now, that collateral consists of the entire stock, as I remember it, of the Chicago Stock Yards and Transit Company and also of the entire stock of the Railway Company, which owns the lease, owns the road, and which also owns the lease to the New York Central, which yields $2,000,000 a year, all told. Such an item of collateral, free and clear of the debt, and yielding the income that it does, the company would not have the slightest difficulty at all in obtaining financing in the Maine Company with which to take care of the preferred stock, which only amounts to $6,500,000, and with which to redeem such common stock as may still be outstanding at that time. The difficulty or the needs that confronted the company during the years, from the standpoint of making a smooth transition from the old organization into the new one, this company would be kept intact without any embarrassment of any kind.

So, it appeared to me that the needs for the ten years from 1930 to 1939, in preparation for 1940 were rather moderate, and that the retention of the amount of earnings, such as was retained in 1930 and '32, was beyond the reasonable needs of the business.

Q. 16. (By Mr. Clark). Now, in view of your examination of the stipulation and the evidence, exhibits, which you have testified, you have examined, and your special training and experience, have you formed an opinion as to the fair market value of the New Jersey Company's common stock, which is owned by the Maine Company, at December 31, of 1930, '32, and '33?

Now, in answering that you may consider the term "fair market value" to mean the price at which a seller willing to sell at a fair price and a buyer willing to buy at a fair

price, both having reasonable knowledge of the facts of the trade.

Do you have such an opinion? A. Yes, sir; I have.

Q. 17. Well, now, what is that opinion for each of the respective years? A. My opinion is that the value of the stock, including the whole interest in the New Jersey Company, which the Maine Company enjoys because of its contract from 1911 to 1914 with respect to its rights, and the net income available for the common stock of the New Jersey Company, that the value of the common stock of the New Jersey Company, at the end of 1930, was $22,742,160; and that the value of the stock with which the Jersey Company held, including in that value all the values that it has, the contract of the New Jersey Company with the Maine Company, which was owned by the Maine Company, is $22,292,160.

Q. 18. Now, will you state to the Board the reasons which lead you to that conclusion? A. What I did in arriving at the value was simply this: I scanned the earnings of the New Jersey Company for previous years, arriving at some figure of what earnings were in prospect for the common stock of the New Jersey Company in 1930.

I took the nine years previous—that is, I took the nine years beginning with 1922 and ending in 1930 of the New Jersey—nine years from 1922 to 1930, inclusive, for the New Jersey Company. During those nine years the average earnings for stocks, preferred and common, were $2,664,216. That was after deducting bond interest of 4 percent on the $4,000,000 and 5 percent on the $10,000,000, or the other way around, whichever it is.

I computed the bond interest on the bonds and after deducting $2,264,216 of money available for preferred and common stock. The preferred stock calls for $390,000 of dividends, $6 dividends, 6½ million of preferred, taking

that out leaves $2,274,216 of net income for the common stock. This common stock I capitalized at ten times the income; that is, at 10 percent. That gave the $22,742,160 for all of the stock.

Of this stock the New Jersey Company itself owned about 60,000 shares during these years in question, and approximately 5,000 shares are not owned by the New Jersey Company but are outstanding in the hands of the public, or were during these years. These 5,000 shares that are not owned by the New Jersey Company are entitled to a nine dollar dividend guaranteed by the Maine Company. If you take out the $45,000 of dividends, of which the 5,000 shares of common stock outstanding are in the hands of the public, from the net income available for all the common stock, as I have given it, there remains $2,229,216 of net income for the stock owned by the New Jersey Company.

Q. 19. Just a minute. You say owned by the New Jersey Company. Are you quite sure? *A.* Of the Maine Company. Of the New Jersey Company, owned by the Maine Company.

Q. 20. When you speak of 60,000 shares, you mean owned by the Maine Company? *A.* Owned by the Maine Company, yes.

That shows at the rate of 10 percent at the rate of capitalization, which would be, of course, a difficult problem. What I did in that matter, I studied various corporations, all those that I could think of, and with whose records I had any acquaintance and scanned the records of various publications, such as Moody's and the Commercial and Financial Chronicle, and various corporations that were comparable to this, studied their actions in relation to stock and net income during the depression.

In view of the fact that the two million dollars of this net income flows from the lease of the Railroad to the New York Central, and in view of the fact that that had been

a remarkably stable income—in fact, it might be considered guaranteed stock—it was practically in the class of guaranteed stock—I looked in the railroad field, and I thought of the Norfolk & Western as one which had a stable income during the depression; also Chesapeake & Ohio; Union Pacific, and the cases of those three stocks I found this, that in 1932 they were selling at the end of the year at a price which was equal to ten times their net earnings—in 1930, I should have said. In 1932 they were selling at nine times; 1933, in fact, at eleven times. Preferred guaranteed stocks, such as Pittsburgh, Fort Wayne & Chicago, Susquehanna, sold at a much higher price, relative to their earnings, than this. In fact, the figure was an average of eighteen times earnings in 1930, fourteen and a half times earnings in 1932, and fifteen and seven-tenths earnings in 1933. I did not, however, accept those. I kept to the more moderate and large and well known stocks.

I studied a number of other industrial stocks that were fairly stable, Allied Chemical & Dye, American Can, Homestead Mining; Beechnut Packing, which was in the food business, and had shown a remarkable record; Coca-Cola; General Mills, a flour milling company; Great Atlantic & Pacific Tea Company, a merchandise company; Quaker Oats. Taking all of these stocks together, railroads, guaranteed and not guaranteed, and these more stable food products, you get a relation of the value of the stock to the earnings in 1930 of 13.4; in 1932, of 12.28, and in 1933 of 14.45. I took ten times for 1932—ten times for 1930, nine times for 1932, and ten times again for 1933.

In 1932, the ten year average earnings for 1923 to 1932, after deducting the bond interest and the preferred stock dividends, was $2,222,495. I valued that nine times earnings, which gives the value for the entire stock of the New Jersey Company, of $20,002,455, and for the stock owned

by the Maine Company—that is, the stock of the New Jersey Company owned by the Maine Company—of $19,687,455. In 1933 the ten years, 1924 to 1933—that is, the ten years ending with 1933, the best indication of probable earnings for the future,—the yield was $2,103,868 for the common stock.

The Member: We will suspend for a few minutes. (There was a short recess taken.)

Q. 21: (By Mr. Clark). Do you recall where you were, Mr. Bixby? A. Yes, sir. I think I had just stated that the average net earnings available for common stock of the New Jersey Company for the ten years 1924 to 1933, inclusive, were $2,103,868 a year, after deducting the dividend on preferred stock.

I valued that by capitalizing it at 10 percent, or, putting it the other way around, at ten times earnings, and the value was $21,038,680; that is the value of the entire 65,000 shares of stock on that basis, deducting $45,000 from the net income of $2,103,868, that being the dividend, guaranteed dividends, and the 5,000 of common outstanding, which left the difference between those two sums for the stock that was owned by the Maine Company. It does not seem to be computed here.

May I be excused for just a moment while I compute it?

Deducting $45,000 required for the guaranteed dividend on the common stock, I arrive at a figure of $2,058,868 that remains available for the common stock of the New Jersey Company held by the Maine Company, valuing that at ten times earnings, which makes $20,588,680 for the New Jersey stock owned by the Maine Company at the end of 1933.

Mr. Clark: Is there any objection to this going in? Is this the original?

The Member: I have the original.

Mr. Clark: Well, I offer the original, Your Honor.

The Member: In order that the record might be quite clear, you are now offering as Exhibit XXXX the summation which the witness said that he prepared from Exhibit C?

Mr. Clark: That is my recollection.

The Member. Is that correct?

Mr. Welch: Yes.

The Member: I mean, I want the record to describe just what this Exhibit XXXX is.

That is the one you are talking about? That is the only exhibit you have prepared so far, is it?

The Witness: Yes, sir.

The Member: About which there has been any talk at all?

The Witness: Yes, sir.

The Member: Very well.

Mr. Clark: I have no further questions, Your Honor.

(The document so offered and received in evidence was marked "Respondent's Exhibit XXXX," and made a part of this record.)

Cross-Examination.

X-Q. 22. (By Mr. Welch). Dr. Friday, I have a feeling that you and I are going to be friends; and in any event I hope we are going to be short, because I have a burning ambition to bring the evidence to a close today.

Have you before you a copy of Exhibit XXXX, is it, the last one marked? A. Yes, sir.

X-Q. 23. Thank you.

First, I want just to say a word about your testimony in respect to the Maine Company being a mere holding company. Are you aware, Doctor, that you are the first witness that has used the word "mere" holding company? A. I was not, no.

X-Q. 24. If my memory is accurate, you are the first.

Do you know the definition of "mere," Doctor? Just "yes" or "no." A. I will say "yes."

X-Q. 25. Will you accept this definition, which I read in the dictionary, "Nothing else but?" A. Yes.

X-Q. 26. That is a good one, isn't it? A. Yes.

X-Q. 27. That is right out of the dictionary.

Now, Doctor, all of us are pretty proud of that Railway lease, aren't we, in this case? A. Yes.

X-Q. 28. Now, did you hear Mr. Prince say how he spent about three years negotiating that lease? A. I read it; yes, sir.

X-Q. 29. And you remember that at that time he was not an officer of the Railway Company or the Transit Company? A. That is correct.

X-Q. 30. Now, during the three years that Mr. Prince was working on that gorgeous lease, working on behalf of the Maine Company, which is the only company of which he was an officer, would you say that the Maine Company was nothing else but a holding company during those three years? A. Yes.

X-Q. 31. You would? A. Yes.

May I give my reasons for it?

X-Q. 32. No. I have not asked you. You might have fun with me if I asked you the reasons.

Now, Doctor, I am not going to take you all through that, but when Mr. Prince and Mr. McDonough go out to Chicago after a fire and decide what to rebuild, would you say that the Maine Company is nothing else but a holding company? A. Yes, that evidence wouldn't modify—

X-Q. 33. O. K. And you have heard us talk about this bank crisis, haven't you? A. Yes, sir.

X-Q. 34. When the Maine Company moved right in on the ground and ran the show? You have heard that testimony, haven't you? A. Yes, sir.

X-Q. 35. While the Maine Company ran that show, as I just put it to you, would you say, Doctor, in fairness to me, that the Maine Company was nothing but a holding company? A. I think I ought to tell you, Mr. Welch—

X-Q. 36. Oh, no, Just answer it for me. You may just be bursting with things to tell me, but would you say it was nothing else but a holding company on that occasion? A. Well, on that occasion it was the one time when I saw clear evidence of its doing—engaging in some business activity outside of holding.

X-Q. 37. Well, thank you, Doctor. And that is right in the period we are talking about, isn't it? A. Yes, sir.

X-Q. 38. And that is one time it looked to you as if it was something else but, didn't it? A. Yes, it engaged in activity.

X-Q. 39. Thanks again.

Now, Doctor, let's take this Exhibit XXXX. That is what you worked out from Mr. Green's figures? A. Yes, sir.

X-Q. 40. Now, curiously enough, Doctor, I don't know that I should say this to you, but all of a sudden we are trying the case on the ground that I thought we might originally try it.

You observe from this exhibit, do you not, Doctor, that the Maine Company never got enough together to meet the debts of the enterprise, did it? A. In liquid assets?

X-Q. 41. Right. That is what I mean. A. Right. Yes, sir.

X-Q. 42. And that is leaving aside the preferred stock not yet dealt with? A. That is correct.

X-Q. 43. Leaving aside the common stock which must still be dealt with some way, but what remains outstanding, the common stock of the Jersey Company still not acquired. A. Yes, if any remains outstanding.

X-Q. 44. Yes.

Doctor, in fairness to me, isn't it somewhat difficult to

say that the unreasonable accumulations have begun until you at least have got enough to meet those hard grinding debts? A. No, it doesn't seem to me.

X-Q. 45. It doesn't seem so? A. No, sir. It is 10 years yet, you know.

X-Q. 46. I know, but those ten years are a blank, you know. In '33 we don't know what they will do to us, do we, Doctor? A. Oh, we never do.

X-Q. 47. And we just have a series of years that have hit us awfully hard. You remember that? A. Yes.

X-Q. 48. So that do you think if you and I met in the directors' meeting, as I have had the other witnesses meet, and I said to you, "Doctor, we have never got enough together yet to pay the debts to say nothing of the preferred and the common that is outstanding, and we have been through such tough times, I think we ought to kind of hang on," would you look across the table and say, "Welch, I think you are unreasonable?" A. Well, I don't know that I would say, "Welch, I think you are unreasonable." I would say you couldn't justify this as a reasonable need.

X-Q. 49. I didn't put it to you that way. A. That is the way—that is my way of looking at it.

X-Q. 50. You know how I like to play the little game. I say to you, "Doctor, we haven't got enough yet to pay our debts to say nothing of this preferred and common and we have been through some tough years, and '40 is a long ways away. I think we ought not to declare out too much."

My question is a simple one. Would you say to me, "Welch, you are just unreasonable?" A. Certainly not. Certainly you are a reasonable man.

X-Q. 51. That is all I meant. These are problems where honest men can differ, can't they? A. Yes, absolutely.

X-Q. 52. And they are difficult problems, aren't they, Doctor? A. Yes, sir.

X-Q. 53. Doctor, will you do one other thing for me? You will need your pencil. Take the year 1929, at the end of the year '29 on Exhibit XXXX. Take your first two columns and tell us, if you will, how much additional accumulations the Maine Company indulged itself in in that four-year period? *A.* Towards paying off its debts? From '29 to '33?

X-Q. 54. Yes. *A.* You mean the movement of the cash and the—

X-Q. 55. That is right. *A.* That is right.

X-Q. 56. There is some shrinkage and some changes in the cash and the liquid assets. I just want to see how much closer together they were at the end of the four-year period than they were at the beginning. *A.* Oh, yes.

The Member: You mean the movement from 19 million up to 22 million as against the 23 million debt? Is that your problem?

Mr. Welch: I am taking 23 million debt in '29—

The Member: Yes.

Mr. Welch: And 21 million debt at the end of '33, and contrasting with those two figures 19 millions of this cash, notes receivable, investments in '29 and 17 millions at the end and to see what the change is, what the variation is between the two figures at the end. *A.* In 1929, the outstanding bonds and debentures exceeded the liquid assets by $4,271,339; and in 1933, they exceeded them by only $3,367,031.

X-Q. 57. (By Mr. Welch). And the difference between those two figures? *A.* The difference between those two figures is, $904,308.

X-Q. 58. Well, I get a little different figure, but let's assume you are right.

Then, Doctor, in four years' time that gap between the debts on the one hand and the cash, the notes receivable,

and so forth, on the other—that gap had been closed only to the extent of $900,000; hadn't it? A. That is correct.

X-Q. 59. That is not a very shocking rate of accumulating, is it, Doctor? A. No.

X-Q. 60. Now, Doctor, let's do it quickly, if we can. His Honor doesn't quite like the percentages, but it will make for speed.

What percentage of the earnings would you in your judgment have declared out as a dividend in the year 1930? A. Well, I wouldn't—I hadn't thought about the percentages. I thought about it rather in reasonable needs of this company as I saw them as a stockholder.

X-Q. 61. Didn't you think about it this morning when I was pressing Dr. Atkins on his opinion? A. About what? About the percentages?

X-Q. 62. Yes. A. Yes. I thought that the percentage wasn't a very pertinent basis on which to handle the thing.

X-Q. 63. Well, you see, your prior experts have set a bad example for you, so I have no choice except to make you follow along. A. Well, I will have to compute it. I will have to tell you what I would have done and then compute the percentage afterward.

I would have said, "Here we are"—

X-Q. 64. Don't make a speech. Just tell me what dividend you would have declared. A. Oh, yes.

X-Q. 65. And then give me your percentage of earnings. A. Well, I would have declared $2,100,000.

X-Q. 66. In what year? A. In 1930.

X-Q. 67. That is what percentage of the earnings? Roughly will do. A. Well, this is just under $3,000,000. That is a little over 70 percent.

X-Q. 68. Thank you.

In 1930 you take out 70 percent.

The next year? A. The next year—in 1932, is this?

X-Q. 69. Let's take '31. A. '31. 1931. '31 I would have declared $1,800,000.

X-Q. 70. Which is roughly what percent? A. Considerably over two-thirds, about 68 or 69.

X-Q. 71. I will take 69 because I like it.

Give me '32, will you? A. '32—

X-Q. 72. First the figure. A. Yes. '32 I would have declared $1,200,000.

X-Q. 73. Which is, roughly, what percent of earning? A. Percents have nothing to do with my getting at this figure.

X-Q. 74. Yes, I know. A. Somewhat less than 60, I guess.

X-Q. 75. Just under 60? A. No, I think it is a trifle under 60.

X-Q. 76. Well, let's have it. A. Just a bit over 55, as a matter of fact.

X-Q. 77. Just a little over 55? A. Yes, sir.

X-Q. 78. O. K. The next one. A. 1933. In 1933 I would have declared over $800,000.

X-Q. 79. Which is, roughly? A. Thirty-three percent.

X-Q. 80. Thirty-three percent.

Dr. Friday, you realize, of course, that if you had declared out those sums, you would have widened this gap on Exhibit XXXX? A. Yes, sir.

X-Q. 81. And started back down the hill again with a gap widening on you? A. Yes, sir.

X-Q. 82. That seems sound and wise to you, to turn around and start widening the gap again after all these years of narrowing it? A. Well, these were years of depression, and one can't expect to go on accumulating things for the payment of debts in those years.

X-Q. 83. Well now, Doctor, it might be, you know, that that is one of the years you should be careful. Hadn't that occurred to you? A. That doesn't seem reasonable to me.

X-Q. 84. I see. And in the tough depression years you

are less careful about your cash than in the gaudy, prosperous years; is that right, Doctor? A. No.

X-Q. 85. Well, I thought that was what you said. A. It isn't right, no. It isn't right.

X-Q. 86. Well, let's try it again.

Don't you think the process of narrowing this gap on Exhibit XXXX ought to have been continued as it had all through the history of the company and not reversed so that you again start to widen it? A. Let me say you are overlooking one thing. This isn't all we did. We bought some stock of the Jersey Company, too, during this period.

X-Q. 87. I know, but that is a side issue, Doctor. You know, you are telling me now when you are going to declare out these dividends that you are going to widen this gap on Exhibit XXXX. A. In these years; yes, sir; I would have done that.

X-Q. 88. And then you are going to widen the gap right in the years of the depression, aren't you? A. Yes, sir.

X-Q. 89. And now if you can go with me, Doctor, I want you to in all honesty. A. Yes, sir.

X-Q. 90. In those awful tough years, is that the time to reverse your policy and start widening that gap again after all those years of trying to close it? A. Oh, that isn't what you do. You are not going about it to widen the gap. That is not the only consideration of corporate policy to widen the gap for meeting a debt 10 years hence.

X-Q. 91. I quite know that, but the inevitable result of these dividend declarations that you sit here and recommend to us is widening that gap; isn't it, Doctor? A. Yes, sir.

X-Q. 92. Now, your history all up to 1929 had been one of narrowing the gap; hasn't it? A. Yes, during a period of remarkable prosperity.

X-Q. 93. Right. Now, after you climb the hill and got it

pretty narrow, I understand you to say that in a time of depression let's turn around and start widening it again; is that right? A. Oh, no, that is not what I say.

X-Q. 94. That is the result of your— A. The considerations that govern the payment of dividend are quite other than that.

X-Q. 95. I will pass it. There may be a whole variety of things that govern it, Doctor.

Now, do you notice that you seem to differ from your learned associates as to the amount of these dividends? A. That may well be.

X-Q. 96. You do notice it, don't you? A. Yes, I notice it. Surely, I notice it.

X-Q. 97. And you differ in the amounts that run into very serious sums of money in any man's language, don't you? A. Yes, sir.

X-Q. 98. Well, it follows, doesn't it, Doctor, that honest, honorable men can have the gravest differences on these dividend policies, doesn't it? A. Yes, sir.

X-Q. 99. And as long as a fellow acts honestly and with the best information he can get, it is not easy to quarrel with him, is it, Doctor? A. No.

X-Q. 100. Did you hear my series of questions this morning of Dr. Atkins when I went down the road with cash in one hand and hope in the other? A. Yes, sir.

X-Q. 101. Would you have answered all that line of questions as he answered them? A. I don't—I would have to go over them again.

X-Q. 102. Well, just think back. You heard it all. Would you have answered that line of questions as he answered them? A. Well, I would really have to know what you are talking about. I think I wouldn't. I think probably I would not.

X-Q. 103. That is what I thought.

And another thing, Doctor: You remember I asked him if he thought a company once in debt ought always to remain in debt? You remember my asking that? A. Yes, I remember it, yes.

X-Q. 104. You will go along with me when I suggest to you that it is honorable to get out of debt, won't you? A. Yes, sir.

X-Q. 105. And a man running an enterprise with an ambition to leave it some day debt free is to be applauded, isn't he? A. Yes.

X-Q. 106. There is no doubt about it, is there? A. There isn't any doubt about it in my mind. It is a laudable ambition.

X-Q. 107. So far as Mr. Prince may have had a plan to leave this enterprise at the time he must leave us, too, free of debt, and in a strong position, you would applaud that plan, wouldn't you, Doctor? A. Yes, sir. I might. The distinction is, it is honorable but not necessary. That is the big point.

X-Q. 108. I know, but it is all on the sound side, isn't it? A. Oh, certainly. It is perfectly honorable. I would applaud it.

Mr. Welch: I think that is all, Doctor.

Redirect Examination.

Q. 109. (By Mr. Clark). Reference was made on cross-examination, Dr. Friday, to the activity of the Maine Company during the bank emergency, and you stated that that was one instance in which there was some business activity on the part of the Maine Company, as I recall. A. Well, it is not clear evidence of the Maine Company stepping out and indulging with its funds in an activity, which in my judgment was purely holding.

Q. 110. Does that affect your opinion that it was a mere

holding or investment company? A. Not by and large; no, sir; because it wasn't regularly in that business. That is not a business. Here was an emergency confronting them as it has confronted all of us. Most people never in their lifetimes have seen a depression before, a major depression, certainly not such a bank depression, and the Maine Company was availed of to go with the rest of the companies in this group for the purpose of doing what seemed wise to Mr. Prince in Chicago.

Mr. Clark: That is all.

Mr. Welch: That is all, Doctor.

The Member: Doctor, I want to ask you one question.

Q. 111. (By the Member). Getting back to these percentages that you seem to abhore equally with me, you say that an amount which approximated 70 percent of the income of 1930— A. Yes, sir.

Q. 112. —would in your opinion have more wisely been distributed than to have withheld it, is that correct? Would have been wiser? A. Well, what I was—what I meant was wise in this sense, that it could have corresponded, as I analyze the problem, to the reasonable needs of a policy—

Q. 113. That left 30 percent unexpended? A. Yes, sir.

Q. 114. Am I to understand you as having the opinion, then, that any withholding of distribution of income in excess of 30 percent in that year was beyond the reasonable needs of the business? A. Any excess beyond what I have there, $800,000 odd, yes.

Q. 115. Whatever the amounts are. I was using the 70 percent only because that was what remained in my mind of the figures. A. Yes.

Q. 116. You mean you left an amount— A. That is correct.

Q. 117. And as I understand you, you would say that the amount which you left was the top, the maximum limit

which would have been within the reasonable needs of the business, so that the amount in excess of that being withheld was a withholding or an accumulation in excess of the reasonable needs of the business? I am trying to say the same thing that you said in another way in order to find out that that was what you meant. A. I am not sure that I would go quite so strong as to the language to say that was the very maximum. There might be difference of opinion. But over a small range—but the objective to which I would have directed my calculations; that is about what I would come to on the board as one of the board of directors.

I would have said, "Well, now, you mean to say you have got $19,700,000 here in cash? What is it about? You say we are going to have this crisis in about '40. That is 10 years away. You have only to meet 23 million of debts. $500,000 a year withheld could cover that and take care of some contingencies besides."

Now, I took $2,950,000—I chose $2,100,000 for one reason because it comes to a straight percentage on the stock although I think I miscalculated on that perhaps, and some sum around $750,000, which would allow for some contingencies and would accumulate us an amount of this cash, liquid assets which would enable us to go on down the street with the money in our hand, pay off the debts, and give us back the collateral, and the collateral is worth a lot of money. That is the lease, and all of the Transit stock. And thereafter we could have sat down and presented them to an investment bank and just waited for the public to bid for whatever securities we were generous enough to issue them at all to clear up this preferred stock. It seems that is all the reasonable needs there was there.

Q. 118. Can you give me any idea of the extent of elasticity in the amount which should have been withheld or might have been reasonably withheld in excess of which or

the excess over which would be beyond the reasonable needs of the business, whether the variation would be in terms of a few thousand dollars or in terms of a few hundred thousand dollars, or what it would be? A. In the year 1930, and my decision allowed $850,000, I should think that was as high as you could go, in my judgment.

Q. 119. Well, that is what I understand is what you said, the way I interpreted your statement. A. That is right.

Q. 120. That is, the amount that you left in was about the maximum amount that reasonably should have been left in? A. Yes.

Q. 121. Anything in excess of that was an unreasonable accumulation beyond the reasonable needs of the business? A. It seemed so to me.

Q. 122. Yes. Now, is that the way I am to interpret the 1932 and 1933 figures which you gave, or is there a variable in there that ought to be given an account for? A. I think you can interpret 1932 in the same manner.

1933 is a difficult problem, because, as Your Honor heard, on the books there is a deficit, and yet there is all this question as to whether that $2,200,000 they wrote off the Transit Company was a real loss, or it is all mixed up in that—in that bank closing, and it is very difficult to tell what there was there at all, so I made it conservative, $800,000.

The Member: Anything further?

Mr. Welch: Just one or two questions.

Recross-Examination.

X-Q. 123. (By Mr. Welch). If I follow your last testimony, it is to the effect that as to the year 1933, it is pretty difficult to say one way or the other whether there was an unreasonable accumulation? A. Yes, sir; very.

X-Q. 124. Thank you very much for that, Doctor.

And then one thing more: I like the honesty with which you have faced this 1940 crisis and the debts and this preferred stock and so forth. There is only one thing we didn't mention, Doctor, and that is when the crisis is over clearly the enterprise ought to have a sound working capital, shouldn't it? A. Yes, sir.

X Q. 125. And a liquid one? A. Yes.

X Q. 126. Could you make some suggestion to His Honor as to what that should amount to? A. Well, that I thought somewhere around $5,000,000.

X Q. 127. Not less than that? A. Not less than that.

X Q. 128. Thank you. A. And that I intend to be provided for in these figures.

X Q. 129. Yes. You are going to borrow your liquid working capital. A. No. I think out of this amount which is to be accumulated, because what we have here, with such pretentions as I have suggested here, we would have well above something above it, but if it were in any event miscalculated, the liquid capital could be borrowed on this stock of the New Jersey Company which the Maine Company holds.

X Q. 130. Just one thing, Doctor: You feel very sure about that borrowing in 1940, which is still obscure to us. If I had sat in the directors' room and said to you, "You sound awfully good to me, Dr. Friday, but I am not free from worry whether we could do it or not, and I will feel more comfortable if we accumulate it and have it in cash," you wouldn't have thought that just entirely unreasonable of me to say that, would you? A. No, but I

X Q. 131. You have answered it. A. I would—

X Q. 132. And now, Doctor— A. No, that isn't answering it at all.

X Q. 133. Well, you said "no." The question was— A. Well, I would have felt sorry for you that you didn't know

any more about what happens to interest rates after depressions.

Mr. Welch: I move to strike the answer out after the word "no." I think it is a poor note on which to end the case. I think I will move to strike beyond the "no."

The Member: I will deny the motion.

Mr. Welch: That is all.

Mr. Clark: I have nothing further.

The Member: Thank you, Doctor.

(Witness excused.)

Mr. Pierson: If Your Honor please, I offer in evidence the recomputation of taxes to which reference was made earlier in the proceedings.

The Member: That is the one which Dr. Atkins made?

Mr. Pierson: No, Your Honor. This is a recomputation of taxes that was offered earlier and objected to. It is based on the computation of taxes under the theory that all of the earnings or profits would have been distributed, following the computation used by the Supreme Court in the case of Helvering and National Grocery Company.

The Member: Now, wait a minute. That is a wide jump. That is going back to the early part of last week.

Mr. Pierson: I think I can clarify it by—

The Member: Well, now, last week it was offered and then an objection was made, and the objection was sustained, and there was some suggestion made about—

Mr. Pierson: Corrections.

The Member: —changing the computation.

Mr. Pierson: That is correct.

The Member: Now you are offering that and there is no objection?

Mr. Pierson: No objection; quite correct, Your Honor.

The Member: It is received.

Was it already marked before for identification? Was any number saved for it?

Mr. Pierson: No, I don't think there was, Your Honor. I was about to reoffer it.

The Member: It is now YYYY.

Mr. Pierson: And that consists, Your Honor, of ten sheets.

(The documents so offered and received in evidence were marked "Respondent's Exhibit YYYY," and made a part of this record.)

Mr. Pierson: Now I offer in evidence a schedule of the sales of the New Jersey Company bonds on the Boston Stock Exchange for the years 1929 to 1933, inclusive. That is eliminating the years for which there were no schedules.

Mr. Welch: Oh, yes.

The Member: That is the one that was put on with Dr. Atkins?

Mr. Pierson: That is correct, Your Honor.

The Member: No objection?

Mr. Welch: None.

The Member: That is received. The number which was saved was VVVV, was it?

Mr. Pierson: And that consists of seven sheets, Your Honor.

The Member: Very well.

(The documents so offered and received in evidence were marked "Respondent's Exhibit VVVV," and made a part of this record.)

Mr. Pierson: If Your Honor please, I now offer in evidence a photostatic copy of pages 522 and 523—

The Member: What number was saved for that so that you don't have to describe it again?

Mr. Pierson: — In accordance with Your Honor's sug-

gestion this morning. I don't believe any number was saved. It was—

The Member: Oh, no. I just want to know which one it is you are offering now.

Mr. Pierson: This is from Volume 35.

The Clerk: That was UUUU.

The Member: UUUU.

Mr. Pierson: Pages 522 and 523.

The Member: All right. That is received.

(The pages referred to were thereupon marked "Respondent's Exhibit UUUU," and were so received in evidence and made a part of this record.)

Mr. Pierson: If Your Honor please, in having these photostated, I find that they didn't complete the schedule continuing on to page 524. If I may be permitted to read that into the record, it will supplement the exhibit which has just been offered.

The Member: Very well. You are now supplementing Exhibit UUUU?

Mr. Pierson: Yes.

The Member: Very well.

Mr. Pierson: On page 524, "George H. Burr & Company, Chgo. 12-30-31," under the column "Wants," at 85. Under the column "Offerings," at 90. "Fuller Crittenden, Chgo. 12-30-31," under the column "Wants," 10 at 90; under the column "Offerings," 10 at 93.

I also offer at this time—

The Member: Wait just a minute. Is that all of the supplement to UUUU?

Mr. Pierson: That is correct, Your Honor.

The Member: All right.

Mr. Pierson: Unless that is marked—I have forgotten just how it was marked this morning.

I also want to offer in page 539 and page 540 of this same volume.

The Member: You mean that is part of the same exhibit?

The Clerk: That is part of the same exhibit.

The Member: Well, let that be put in as part of the same exhibit. That makes the pages how many?

The Clerk: Three pages in all.

The Member: All right. That is what you said in the first place, isn't it?

The Clerk: Yes.

The Member: Now, is there anything more from those books?

Mr. Pierson: Yes, Your Honor. And if I can get the exhibit number from the Clerk on the next—

The Clerk: TTTT. That is from the No. 36 Volume?

Mr. Pierson: That is correct.

The Clerk: Yes.

The Member: How many pages of that?

Mr. Pierson: Three pages, Your Honor.

The Member: That is received as Exhibit TTTT.

Is that complete? Is Exhibit TTTT complete?

Mr. Pierson: That is complete, Your Honor.

The Member: Very well.

(The sheets so offered and received in evidence were marked "Respondent's Exhibit TTTT," and made a part of this record.)

The Member: Now, what else?

Mr. Pierson: That is all.

Mr. Clark: Respondent rests.

Mr. Green: We have one short witness, Your Honor, who won't take more than—we will finish by 4:30, I think, in rebuttal.

The Member: I am going to quit at 4:30 finished or not. Now you can take your choice. If you want to quit now, I

will quit now. If you want to go on now with that assurance, you may do so.

Mr. Welch: It simply depends on what happens tomorrow. I take it Your Honor wants oral argument?

The Member: I want oral argument.

Mr. Welch: Then I see no reason why we shouldn't put this bit in in the morning.

Mr. Green: Might as well.

Mr. Clark: Your Honor, I want to say this: So far as Respondent is concerned, the case is going to be briefed. The Respondent is not prepared for oral argument at this time.

The Member: Well, I prepared you, Mr. Clark, last week.

Mr. Clark: I realize that.

The Member: Now, wait just a minute. The rules have stated succinctly and clearly that the parties in every case shall be prepared to make oral argument at the close of the submission of the case, and in view of the uncertainty in which I have labored throughout this proceeding, I want this case submitted with a clear statement on the part of the Government as to what its theory is and as to how the evidence measures up to the theory which the Respondent has selected for his case, and it is for that reason that I want oral argument.

Mr. Clark: Well, the Respondent has selected, Your Honor, or has elected to rest on the determination of the Commissioner in the 90-day letter to the effect that section 104 applies in this case. The Respondent is standing on all of the provisions of section 104 except that Respondent admits the corporation was not formed for the purpose—for the forbidden purpose, as we call it.

Other than that, Respondent rests on the statute.

The Member: Do I understand that you are going to refuse to make an oral argument?

Mr. Clark: I have no argument to make, Your Honor, in that regard. Respondent rests on the statute. I have no desire to be interpreted as refusing to make an argument, but that is the only argument I can make.

The Member: We will have an oral argument at the close of the trial. That will take place tomorrow morning.

Mr. Welch: Could I ask just one question? Could the argument for the Petitioner be divided between Mr. Green and myself?

The Member: Yes, and there will be an hour on a side allowed. You can divide it on either side the way you want to.

Mr. Welch: And who argues first? I had hoped—

The Member: The Petitioner is the proponent.

Mr. Welch: I had hoped that in your discretion, because of the fog in which we are, that the Government might be ordered to argue first, because I have yet to see the fulfillment of Mr. Pierson's promise that the issues would be made clear to us.

The Member: I am not making any order. I am telling you gentlemen on both sides in the case that there will be oral argument desired at the close of the trial, and that I am allowing one hour on either side, and you may divide that as you will, and the responsiblity for saying on the part of either one of you that there will be no oral argument will be yours.

I haven't any power to order Counsel to do anything, particularly when Government Counsel are not listed and enrolled as members of the bar before the Board. This is the first time that this suggestion has ever been made, and I hope that it won't be fulfilled in this case.

We will suspend until 10 o'clock tomorrow morning. (Whereupon, at 4:25 o'clock p. m., February 8, 1939, the hearing in the above-entitled matter was adjourned.)

[Title omitted.]

NINTH DAY.

REPORTER'S MINUTES.

(Filed Feb. 13, 1939)

Hearing at Washington, D. C., on the 9th day of February, 1939, at 10 o'clock a. m.

The hearing in the above-entitled proceeding was resumed on this the 9th day of February, 1939, before the HONORABLE JOHN M. STERNHAGEN, Member of the United States Board of Tax Appeals, pursuant to adjournment heretofore taken.

Appearances: (Same as heretofore noted).

PROCEEDINGS.

The Member: You may proceed, gentlemen.

Mr. Pierson: If Your Honor please, I have just spoken to counsel on the other side. My associate, Mr. Clark, is ill this morning and could not come before the Board, and I told him that I was going to propose and ask Your Honor for an adjournment of the case until 2 o'clock this afternoon in order that we may make the oral argument to which we referred yesterday; and on that ground I ask leave or move for an adjournment until 2 o'clock this afternoon.

The Member: Now, what about the further evidence in the case? There was to be further evidence before the oral argument began. Is there any reason why that should not proceed? There was to be rebuttal testimony, as I understand it.

Mr. Pierson: Well, if Your Honor please, I would prefer that Mr. Clark be here in that regard.

The Member: How much time do you think your rebuttal testimony is going to require, Mr. Welch?

Mr. Welch: That, if Your Honor please, will be short indeed, ten or fifteen minutes. It is all so simple that if Mr. Pierson were advised of what it is he would well say, "Let us put it in."

The Member: Could you tell him without making—

Mr. Welch: Could I say one other word?

The Member: Yes.

Mr. Welch: Naturally I do not think any attorney would propose a postponement at this date on account of illness. I did, however, want to say this, Your Honor; Mr. Green and I have worked on this case since last August without our usual vacation, and we are almost at the end of our resources. We have contemplated arrangements about going South tonight, happily to loaf for some time. We want to go, and I should like to say now that if we adjourn until 2, in so far as I have any rights, and I think they are not very great, and they are not unreasonable, if we do go on at 2 and finish the case today—I hate to say that; I have no right to suggest it—before 4:30, but at least we want to finish it today.

The Member: If we start at 2, and I am speaking now only of the oral summation of the case, when I said yesterday, suggested an hour on a side, I meant that as a maximum and not as a suggestion that I expected an hour would be consumed if it is unnecessary to take that length of time. I just wanted you to condense whatever you have to say within an hour rather than to expand it to take up an hour. So that if the theory of the time for the oral argument is correct, we ought to be through by 4 o'clock, because I shall adhere rigidly to the time. Starting at 2, we should be finished at 4, or earlier.

The question is whether we can dispose of this very short

evidence now rather than to wait until 2 o'clock and prolong the afternoon session, and I think if you will tell Mr. Pierson what it is you are going to put in, he may be willing to let it go in without Mr. Clark.

(Mr. Green, Mr. Pierson, and Mr. King confer.)

Mr. Pierson: I think, if Your Honor please, having examined the documents which Counsel for the Petitioner exhibited, we can proceed at this time.

The Member: Very well.

Mr. Green: I offer in evidence a notice of deficiency dated January 17, 1939, with statement attached addressed to the Chicago Stock Yards Company, the Petitioner in this action, for the years 1934 and 1935.

Mr. Pierson: If Your Honor please, I realize that the door has been opened with respect to the subsequent years in this case, but I fail to see the materiality of a deficiency letter which covers those years.

The Member: I do, too. What is it?

Mr. Green: If Your Honor please, as Mr. Pierson has stated so many times, he put in this later evidence to show the subsequent history of this company. This shows the subsequent history. Beyond that, it shows that one of those future contingencies which might be within the contemplation of directors of a corporation has come to pass.

The Maine Company for the subsequent years has been taxed as a personal holding company, which, of course, required it to distribute the larger part of its income, and it will be able to accumulate nothing to aid it in taking care of its 1940 program. It also serves—

The Member: Now, wait just a minute. Let me absorb that for a second. You mean that this tends to show that between the years in question here and the so-called crisis of 1940 that there have in fact been some unforeseen events which make demand upon the surplus of the corporation

and tend to show the reasonableness of the fact of accumulation in the taxable years; is that the theory?

Mr. Green: That is in part it, and in part to show that when these experts for the Government testified, the Maine Company would be under no difficulties in meeting its 1940 obligations if they were not taking into consideration future contingencies.

The Member: Yes.

Mr. Pierson: I might add, Your Honor, that I do not believe that that is a final determination, is it, by the Bureau of Internal Revenue?

Mr. Green: It is a notice of deficiency.

Mr. Pierson: But with respect to whether the corporation has paid the taxes stated herein

Mr. Green: It is a notice of deficiency.

The Member: That is all you are offering it for?

Mr. Green: That is all I am offering it for.

The Member: I will overrule the objection.

Mr. Pierson: Exception.

Mr. Green: May I have leave to substitute a photostat for the original?

The Member: If it is a legible photostat.

Mr. Green: It is. I will display it to Your Honor.

The Member: What number is that?

Mr. Green: That is a notice of deficiency consisting of one page, and a statement attached consisting of seven pages.

The Clerk: Petitioner's Exhibit No. 46.

(The document so offered and received in evidence was marked "Petitioner's Exhibit 46," and made a part of this record.)

Mr. Green: Mr. Donovan, will you take the stand, please?

The Member: You have already been sworn?

The Witness: Yes, Your Honor.

MR. JAMES F. DONOVAN

having heretofore been duly sworn, was recalled as a witness for the Petitioner, and was examined and testified as follows:

Direct Examination.

Q. 182. (By Mr. Green). Mr. Donovan, I show you Respondent's Exhibit E. That consists of a schedule of securities sold by F. H. Prince & Company to the Stock Yards Company during the year 1930 when there were none, and during the years 1931, '32, and 1933 when there were some such sales.

(Witness nods head affirmatively.)

Q. 183. Can you tell me, Mr. Donovan, how the prices at which those sales were made from F. H. Prince & Company to the Maine Company were fixed or determined? *A.* I can.

Q. 184. Will you please do so? *A.* Those securities were sold at the then current market values.

Q. 185. Were those securities all securities which were listed upon some stock exchange or traded in upon the over-the-counter market? *A.* They were.

Q. 186. Mr. Donovan, have you prepared a schedule showing the disposition of these securities contained in Respondent's Exhibit E by the Maine Company? *A.* I have.

Q. 187. Have you that schedule with you? *A.* I have.

Q. 188. With reference to the date on that schedule, Mr. Donovan, with the exception of certain market values as of December 31, 1938, has that schedule been prepared from the books of the company? *A.* Yes, it has.

Q. 189. And are those books here in this courtroom? *A.* They are.

Q. 190. Now, I notice that as of December 31, 1938, some of those securities which appear on Respondent's Exhibit E

were still retained by the Maine Company undisposed of. A. That is true.

Q. 191. And that you have included in the schedule, a value for these securities on December 31, 1938; is that correct? A. That is correct.

Q. 192. Will you please tell us how that value was determined? A. These quotations were valued—were secured from the Financial and Commercial Chronicle and other sources.

Q. 193. And what other source? A. From the so-called unlisted security market quotations, through that market.

Mr. Green: I offer this schedule, Mr. Pierson.

Mr. Pierson: May I ask the purpose?

Mr. Green: The purpose is to show in Mr. Clark's opening he indicated that there would be a contention on the part of the Government that the Maine Company did not need its property, its liquid property, because a portion of it was diverted to purchasing securities from F. H. Prince & Company.

The purpose is to show that these securities have all either been disposed of by the company or are all marketable securities which can be disposed of at a net price in excess of what the Maine Company paid F. H. Prince & Company, and that, in fact, the Maine Company was not used as a dumping ground for worthless securities.

Mr. Pierson: If Your Honor please, I do not see the materiality of the document. The fact remains, it seems to me, that the Maine Company actually made these purchases of stock from F. H. Prince & Company, and after it comes into the hands of the Maine Company I do not see where it is material as to what the Maine Company does with it. They become assets in the hands of the Maine Company, but what the Maine Company does with them

after they are acquired it seems to me to be entirely immaterial.

I object.

The Member: I will overrule the objection.

Mr. Pierson: Exception.

The Clerk: Petitioner's Exhibit No. 47.

(The document so offered and received in evidence was marked "Petitioner's Exhibit 47," and made a part of this record.)

Q. 194. (By Mr. Green). Mr. Donovan, have you at my request prepared a schedule showing the purchases by the Maine Company of common stock of the New Jersey Company during the years 1934 to 1937, inclusive? A. I have.

Q. 195. And was that schedule prepared by you from the books of the Maine Company? A. It was.

Q. 196. And have you the books present in the courtroom from which it was prepared? A. I have.

Mr. Green: I offer that schedule.

Mr. Pierson: No objection.

The Clerk: Petitioner's Exhibit No. 48.

(The document so offered and received in evidence was marked "Petitioner's Exhibit 48," and made a part of this record.)

Q. 197. (By Mr. Green). Mr. Donovan, has the Maine Company purchased any common stock of the New Jersey Company since December 31, 1937? A. They have.

Q. 198. Have you personally participated in making such purchases? A. I have.

Q. 199. Will you please tell us the number of shares of the common stock of the New Jersey Company which the Maine Company owns today? A. 64,369.

Q. 200. Leaving outstanding in the hands of others how many? A. 631 shares.

Mr. Green: Your witness.

Mr. Pierson: No questions.

(Witness excused.)

Mr. Green: That is all of the Petitioner's rebuttal.

The Member: We will suspend now until 2 o'clock preparatory to summation in the case.

Mr. Welch: I understand, however, that the evidence is closed on both sides.

The Member: The evidence is closed on both sides.

Mr. Pierson: There is just one matter, if Your Honor please, in regard to Respondent's Exhibit D. When that was offered in evidence there was put in pencil sheets, and I have had those typewritten, and if Your Honor will prefer, I will submit one of those typewritten sheets. It is more legible, so that it is easier to read. They are the so called revised balance sheets.

The Member: Have you seen this, Mr. Welch?

Mr. Welch: No. I am sure it is correct, and there is no objection to the substitution.

The Member: Very well. Let this be marked Exhibit D in substitution for the other.

Mr. Pierson: That consists, Your Honor, of seven sheets.

The Member: Now, have you both thought carefully, so that no loose ends are left dangling now, so that the case is closed? If there is any doubt about it, I will sit here and let you both ponder, so that when you open again at 2 o'clock I do not want any further talk except to hear whatever there is said by counsel by way of summation of a closed case.

Mr. Welch: The Petitioner rests. The evidence is clearly closed.

Mr. Pierson: The Respondent likewise, Your Honor.

The Member: Very well. We will suspend until 2 o'clock this afternoon, and will — perhaps I should not request this,

that both sides decide before 2 o'clock how you are going to divide your time, and more particularly we would like for the Petitioner's Counsel that they make up their minds how much of their time they are going to use in opening, so that I may have some idea as to when the Petitioner's opening will be closed, the Respondent's argument will then take place, and the Petitioner will use whatever time is in reserve for the closing.

Mr. Welch: I will say now that I will argue for the Petitioner and that my present notion is that I shall argue but once and not in answer to the Government's argument.

The Member: Very well.

(Whereupon, at 10:23 o'clock a. m., a recess was taken until 2 o'clock p. m. of the same day.)

Afternoon Session.

The Division resumed hearings at 2 o'clock p. m., whereupon the following proceedings were had:

The Member: Do you feel all right, Mr. Clark?

Mr. Clark: I feel very much better, and I want to say I appreciate your courtesy in continuing this matter.

The Member: It is all right. I am sorry you are not well.

Argument on Behalf of the Petitioner.

Mr. Welch: I think it is fair to say this case has seemed as long to me as I think it has to Your Honor, and I am glad now that now we may bring it to a close.

As I start my argument, I know no better way to begin than the place at which the case itself began; that is, the notice of deficiency. Before I read that, as I mean to read it, I should like to read what I consider to be a proper re-

tice of deficiency in a case with which Your Honor is familiar. That is the Rands, Inc., case, Docket No. 74942, before this Board in which Your Honor wrote the opinion. In the statement of reasons, the notice of deficiency in that case read as follows:

"That you have incurred liability under the provisions of section 220 of the Revenue Act of 1926 and section 104 of the Revenue Act of 1928. The fact that your company is a mere holding or investment company and has permitted your gains and profits to accumulate beyond the reasonable needs of the business instead of being distributed is construed as prima facie evidence of a purpose to prevent the imposition of the surtax upon your stockholders. Accordingly, you are subject to a tax equal to 50 percent of your net income as defined in section 220(d) of the Revenue Act of 1926, and section 104 (c) of the Revenue Act of 1928."

I read that to Your Honor because I conceive that to be a proper notice of deficiency. Clearly, the taxpayer in that case was advised of three things: That he was charged with the intent; he was charged with being a mere holding company—or it was charged with being a mere holding company; and that it was charged with having permitted its gains and profits to accumulate beyond the reasonable needs of the business. And had I been counsel for Rands, Inc., I should have known just how to try my case.

Now, I would like to contrast with that the statement accompanying the notice of deficiency in the case that is now before Your Honor. It is attached to the petition as Exhibit A and it reads as follows:

"After careful consideration of your federal income tax returns, the protest as mentioned above and all other available information, the Bureau holds that your corporation is subject to taxation under section 104 of the Revenue Acts of 1928 and 1932."

And that is all it says. Now, it is obvious, if Your Honor please, that these two statements, the one in the Rands' case and the one in the case at bar do not equal each other. It is difficult for me to believe that they are drawn thoughtlessly. The difference, it seems to me, is almost fantastic. It must be that there is some significance in the difference between what I conceive to be a proper notice of deficiency and the notice that we have here, and I am not surprised that Your Honor took quickly the view that the question of a mere holding company or the question of unreasonable accumulations was not at issue here, and I think Your Honor has been perhaps a bit restive as we conducted what seemed to you and what I confess seemed to me a pillow fight for most of the case.

But Counsel in preparation of the case and trial of the case was faced with something else, that had been said by a Member of the Board in an opinion in another case, which is the Mellbank case, Mellbank Corporation v. Commissioner, which is Docket No. 80008, before this Board, and I should like, if I might, to read a short paragraph from that opinion.

In the deficiency letter Respondent held only that the Petitioner was "subject to taxation under the provisions of section 104 of the Revenue Act of 1932"; that is to say, in the Mellbank case the statement was substantially or precisely identical with the one here.

The Court for the Board further went on to say:

"It was not indicated whether such holding was based upon the premise that the petitioner corporation was formed for the indicated purpose or that it was availed of in the taxable year for such purpose, or both, nor did the deficiency letter hold that petitioner was 'a mere holding or investment company,' or that its gains and profits had been

permitted to accumulate beyond the reasonable needs of the business.

"On brief Respondent urges in support of the determination. We shall therefore consider seriatim the various arguments stated."

And then the Board considered everything.

Now, of course, it does not say "we must therefore consider"; it says merely "we shall consider."

But with that case facing Counsel, and that statement in it, as I indicated to Your Honor before, nobody at this end of the table had the courage to try the case on the issue that we thought actually was involved. We did not dare stop short of trying both the question of accumulations and the question of the mere holding company. Now, if through terror we tried something that we should not have tried, it seems to me nothing could have followed from our injection, if you wish to put it that way, of that issue in the case, other than, perhaps, this way, that if through terror we injected the issue it then placed us just in this position, that it is not as if those things had been found by the Commissioner, but simply that the issue is injected, and at the highest, or, I should say, at the lowest, the Government has the burden of proof on the questions of mere holding company and unreasonable accumulations.

But I cannot make it too clear to Your Honor,—it is my own belief that those issues are not in the case, and that it was beyond our power of ever making the issue, and yet with the Mellbank case before us we had no choice as we tried the case, and I think Your Honor will understand that I have no choice as I argue it; I must argue on the questions of holding company and unreasonable accumulations.

The Member: Your petition makes the issues.

Mr. Welch: I have said that we have stated those issues,

and, as I say, at the highest we may have created a lot of terror in issue. If so, I think it is an issue on which the burden is fully as much on the Government, and I think more, than it is on us.

Now, on the point of a mere holding company. I have argued before Your Honor all along in the case as I cross-examined witnesses, and it seems to me that there is very little that I can add. That must have been made apparent to Your Honor. I think the issue as to whether or not we are a mere holding company was settled as early as 1922, and in the three years prior to that, when the New York Central lease was negotiated. Certainly the Maine Company was doing something about the Railway Company which has become of the utmost significance in this case. It was settled again at the death of Mr. Sporr in 1926, when, as some of the western witnesses put it, the East came west, and I think Mr. Leonard added, "It was only a little while that I was the hired man. My orders came from the East, and the most we did from the west was initiate suggestions and send them along, and we either got the veto or we got the green light to go ahead." From 1926 on the issue of a mere holding company was settled every day and every month by telephone call, by letter, by constant supervision, the choice of bank accounts, the selection of key men, told not to build hog houses, told to put money in the banks, and hundreds of things we thought of, and, as I put to the witness yesterday, the definition of "mere" as I found it is "nothing else but." It takes so little, so little to make a holding company something other than a "mere." And I think the case was settled by Dr. Friday on the stand yesterday. Even Dr. Friday, the expert for the Government, could not see any longer that it was a mere company.

Now, what evidence is there against that? An expert

takes the stand, and if Your Honor will pardon me for commenting on it, he is allowed to testify as a matter of opinion that we are a holding company. He does it by looking at some ancient tax returns and percentages of time spent by Mr. Prince in running this company or that. Well, it seems to me that is a fanciful and slender way of going about facts, that the East ran the West, and that the hand of the Maine Company rested, not lightly, but heavily on those companies all through this period. It seems to me too clear to require further argument from me.

I then pass on to the question of unreasonable accumulations, always pausing to remind Your Honor that I do not have the issues in the case, but feeling that I must argue them.

The Member: Well, Mr. Welch, I want to be sure that I understand you. There was a definite allegation that that is the fact in the petition.

Mr. Welch: That is correct.

The Member: And that allegation is denied in the answer.

Mr. Welch: That is correct.

The Member: And you think, notwithstanding that fact, the absence of the determination of that factor in the deficiency notice still leaves the issue which the Petitioner itself raised in the petition is not in the case; is that the way I now understand you?

Mr. Welch: I doubt if we could inject the issue in that way. If it was, it was injected in the ordinary way, the position of the Respondent and the position of the Petitioner precisely equalled before Your Honor as we talked about the fair preponderance of evidence on those two points, and if there was an issue raised that should not have been raised, and Your Honor strongly took that

view, I suppose it would be within our power even now to withdraw the issue by an amendment to the petition, but that has been—

The Member: I think you will find some law on that subject, which I shall be glad to have you consider in your brief. In the Andrew W. Mellon case, in which the Petitioner did allege in his petition and raised an issue which he was not required by the notice of deficiency to raise, and the Board, I think, held that since the Petitioner had made the allegation and thus had taken upon himself the burden of establishing its truth, he could not be heard to say that the issue was not in the case of his own raising, and must be held to the standards of proof, which his own issue put upon him. But I merely suggest that for further study before you reach the case.

Mr. Welch: I am quite willing to face that because I think Your Honor certainly would be far from criticizing Counsel who were in the position that I pointed out to you at the beginning of my argument for raising an issue which the Board had certainly to a notable extent indicated was in the case whether the original notice of deficiency was correctly drawn, as I put it, or incorrectly drawn.

Now, on the accumulations I don't think that there is much I need do except to turn to the chart, which in the end became the guide for both sides. The validity of the chart and its significance has, I think, been apparent to every one, and I am, of course, speaking of Plaintiff's Exhibit 45. It is perfectly clear from all the Government experts that the red column represents the low, as you might say, of what must be done in 1940, although some of them very clearly, and others a little more grudgingly, and by "all of them" I mean the Government's experts, say the Jersey Company should be liquidated. Clearly, I should suppose, there is no one in the court room that doesn't

feel that that company should be liquidated. Nobody has challenged the validity of the red columns in the sense that they represent what is needed to liquidate it. It is true, of course, that the blue columns are the liquid or fairly liquid assets available to do the job, but it is equally clear that if they were all used every cash box would have been scraped clean, every security gone, and the whole enterprise stripped of its working capital. And so I say to Your Honor that until the blue columns rise at least to meet the top of the red columns, the question of unreasonable accumulations has not yet come over the horizon. There is no room yet to talk. But I don't even have to say that. I can go with Dr. Friday and I can compare the red columns against only the hard solid fact of debt, just plain debt, and never in any of the years in question—never, in fact, in any year at all has the blue line risen to meet that part of the red column marked "B" which is just plain debt.

Now, surely, surely, until this company has accumulated enough to pay its debts, no one can stand in this room and say with conviction that the accumulation is entirely unreasonable. If that blue column had risen above the "B" I should in no sense have been embarrassed because it always must be remembered that that is everything there is, and that any company needs, and, particularly, any company this size needs: A very substantial working capital. We have learned in this case, whether my brothers like it or not, that ten million dollar emergencies can arrive unheralded and, by the ten million dollar emergency I, of course, mean what happened in the Chicago banks. And so, Exhibit 45, this chart, remains as the measure of what had to be done, and as a visual proof that it never has been done.

And as the Government experts take the stand it is curious to me, Your Honor, they applaud everything up to

1929. They will say the accumulations were good up to then; all right to do that. But they say, "You have done so nice a job by 1929, you can slow up now and push out more to your stockholder." To which the answer, I think, is never until the job is done; never until the blue column rises to equal all the red columns must that thought be considered. It has been a long hard road up these blue columns, and in 1929 it might well be that they turn down again, as, in fact, they did. So that this company might well have had a cushion clear about the top of these red columns in the years here in question, a cushion against the 10 million dollar disaster that overtook them, and no one, I think, could have complained of that. And yet they never succeeded in building that blue column even up to the line of that hard rocky portion marked "B" which means debt.

Now, if Your Honor please, I would like to chat for a moment along quite a different line. I would like to imagine if we can that Mr. Prince has gone to see his old friend Mr. Walker, who testified in the case, and Mr. Prince is now talking to Mr. Walker, and we are in the year 1933.

Mr. Prince says, "Mr. Walker, I have had the opportunity to talk to three business experts about my business, and I got the opportunity free. I talked to a Mr. Merriman, to a Dr. Atkins, and a Dr. Friday, and I would like to tell you, Mr. Walker, what those three men said to me. First, Mr. Merriman, I told him I had this worry and this trouble, this debt I owed, and I asked him what he thought about it, and Mr. Merriman said to me that he liked the prescription I have been taking all the way up to 1929, building up assets to meet the debt. But he said I didn't need to take the prescription in such quantities any longer, and that he had a new medicine for me. He said that if I quit taking my prescription he would give me a pill made

out of a blue line which was ten times earnings. In some way I could take a picture of ten times earnings somewheres and borrow money for my 1940 requirements. And I listened to Mr. Merriman, and I went away.

"And then I got a chance to talk to a man named Dr. Atkins. And he discouraged me because he said my disease was permanent; I would always have to remain in debt. And Dr. Atkins I couldn't understand at all because he said he was just as happy about hope as he was about cash. And he said that if he owed a mortgage on his house, he wouldn't care whether it was paid off or not. And I didn't get any comfort out of Dr. Atkins.

"And then, Mr. Walker, I went to see a Dr. Friday, and, Mr. Walker, I liked him. I thought he was honest, and I thought he was intelligent, and he talked to me about my business. He, too, said he thought I had been taking the right medicine up until 1929, these accumulations, but he, too, wanted to reduce the dose; and, Mr. Walker, he wanted me to cut it down right in the years when I was feeling worse, right through the depression, and it seemed more important to me than ever that I should build up my cash reserve.

"Now, he had something he was going to do for me in 1940 if I cut down this dose that I had been taking. He was going to have me borrow on a collateral trust mortgage. That bothered me because I heard collateral trust mortgages aren't very happy things nowadays; that they have gone out of style. And another thing that puzzled me about him was that he thought I had better run for luck on borrowing enough to pay off the preferred 6½ millions, and I have got to go out, Mr. Walker, and borrow my working capital, another 5 million, if I take his prescription. And I don't know, Mr. Walker, what it is going to be like in 1940, and these experts that I talked about don't agree

about how large this dose of accumulations that I like each year to make me feel good should be. They differ about it. And they are awfully good men, and they are experts and they puzzle me and they leave me worried. What do you think about it, Mr. Walker?"

And now, Mr. Walker, his old friend, and a very experienced man, speaks, and this is Mr. Walker speaking:

"Well, Mr. Prince, at the best you are going to have to have an operation of some kind in 1940." And I can see Mr. Prince recoil. "I am afraid of operations." "I know, but I think it will be all right. You may need a little oxygen, but I think this financial operation in 1940 will be all right, and you leave it to me. When 1940 comes, I think some way, if you haven't got enough to pay your debts and liquidate the Jersey Company—I think in some way we will manage to find it for you, but it is going to be an operation."

And now I would like to imagine Mr. Prince going away after having talked to all of them, sitting down and thinking and saying, "Well, the doctors disagree and they worry me, too, but I know one fine old household remedy. I know that if I save up my funds to pay my debts, that that is just so simple and so beautiful that it will let me sleep nights every night between now and 1940, if I can make the grade, and every night thereafter."

And so I would suppose that had Mr. Prince had the pleasure of talking to all of these wise men in 1933, as I have now imagined, and had them praising him for his conduct in accumulating up to 1929, and then been puzzled by their saying "Let's cut it down now," I think after talking to all of those men and hearing their divided counsel, that Mr. Prince would have said to himself, "No, I plotted my course a good many years ago. It is simple; it is understandable; and it is safe. I am taking out $400,000

a year. That is all any man can wish for. I think it is a generous dividend. It is 5 percent on the capital stock. And I will save the rest, and if, happily, the time comes before 1940 when I can make the blue line equal or exceed the red, I will give three cheers and push it all out, but I will not do it until then."

Now, I turn to argue the one thing that we all know is surely in this case, and which I must face squarely, and which I face with pleasure, and that is the question of intent. There is, of course, the finding of the Commissioner which involves in it, as I view it, a determination of the intention to avoid the imposition of surtaxes which existed. When we reach the court room and we show our hand as was said in the United Corporation case in the second circuit, as I understand the law to be, the presumption disappears; but I am not sure of whether this Board has always taken that view. It may be that it is the view of the Board that the presumption continues and must be overcome by petitioners' fair preponderance of proof. I don't at all care which it is because the task in this case doesn't seem to be difficult. I think the record of Mr. Prince's intention has been made clear all through the years. I think it began as early as 1911, when he urged Jersey stockholders to take bonds of the Maine Company instead of having their stock stamped, and gave them a little inducement of an extra one percent. I think it was clear then as early as that, that the intention was to liquidate the Jersey Company when its charter expired, and, certainly, before Christmas was celebrated in that year. When 1914 came around, his intention was made clear, because F. H. Prince & Company had gone out into the market and started to buy Jersey common stock. By 1918, as I remember it from the evidence, F. H. Prince & Company had put up something like 4 millions of dollars of Mr. Prince's money to buy Jersey common. You

can see why it was necessary as you look at the blue column. I think it was Mr. Merriman who said the enterprise was a thin margin enterprise until the New York Central lease came in. It was so thin a margin enterprise that Mr. Prince, as I say, put up 4 millions of dollars to go and buy Jersey common, so that he could be sure in 1940, although it was years and years ahead of him, that he would control the destiny of that company, and that he could take care of its liquidation.

Then his intention was made clear again, so far as the evidence in this case is concerned, when he talked to Mr. McDonough in 1925, and told Mr. McDonough what his plans were. He said he wanted the Maine Company to accumulate cash so that it could pay off the indebtedness of the Jersey Company when 1940 came, so that he could own this enterprise free of debt. And I think on another occasion he said to Mr. McDonough, "Fifty years is long enough for a concern to be in debt; I want it out of debt when the time comes." His intention in this case was made clear once more, at least, and that is when he talked to Mr. Reimers about the Chicago bank situation.

I thought it was entertaining and interesting to hear Mr. Reimers' story of it. He hadn't met Mr. Prince before; he knew nothing of this enterprise and what it was. Mr. Reimers was being invited to come in in what almost amounted to membership in the family. So Mr. Prince sat down with him and told him what his companies were and what they had been doing and what his plans were for them, and he told Mr. Reimers then that he was going to need lots of money in 1940 to do a gigantic task that then faced him. And not only that, Your Honor, he recorded that conversation as one of the milestones in this case, and he recorded it in the subordination agreements that are in evidence here after the money was put up in the Chicago

banks. He did this remarkable thing so consistent with his whole life. He insisted that the Maine Company's money should be on the upper level of the subordinated funds so that its money should come out first. Not much came of it, I admit, because we quite know that if the money of the operating companies had come out on equal basis, he could have ordered it up by dividends, but he liked the idea that there should be no delay in the Maine Company's money reaching it. We are not so far away from 1940. He wants to be sure it gets there.

If Your Honor please, he recorded his intention in another way, in a chart which has had little attention so far in this court room, and which I meant to save for argument. I am now speaking from chart No. 40 that had an unlovely affectionate name. As we worked on the case, we called it "The sucking chart," because it shows how the Maine Company sucked out all the income and many times more than the income of all the underlying companies. It is my hope that Your Honor will some day sit for a moment or two and study that chart, because I think it has an immense probative force in this case. If you studied this chart for 1923, oh, let us say, when the full effects of that gorgeous Railway lease come in, you will find that on this sucking chart the Maine Company sucks up all the income of the operating companies. Now, why is that important, if Your Honor please? It is important for this reason:

Mr. Prince is accused here of having the nefarious purpose of avoiding surtaxes, and that he accumulated funds in the Maine Company instead of pushing them out in the form of dividends to himself. Now, that implies, if Your Honor please, that he is a crafty person, and I should think with figures of this size it would be natural to infer that he might have had a lawyer talk to him, or, at least, an accountant. Now, if Mr. Prince had this nefarious purpose,

this crafty purpose, how simple it was to carry it out. I don't need tell Your Honor what is in my mind. How simple it would have been to let the money lie in the subsidiaries and not suck it up into the Maine Company. He could have let the earnings of the Transit Company lie there; Produce Terminal lie there; and, in particular, he could have let the earnings of the Jersey Company lie there. Certainly, certainly there was every reason why 14 millions of dollars should have been allowed to lie in the Jersey Company, because 14 millions is needed by that company in 1940 to pay its debts.

Is it credible that a crafty man planning, so to speak, to cheat the game on surtaxes should be so dumb and so stupid as to draw all that money up there when it is so simple to leave it behind? And then look at his stupidity in 1933. The enterprise as a whole in 1933, if Your Honor please, is some $80,000 in the red. It actually has no earnings. And what does Mr. Prince do? He sucks up to the Maine Company earnings from prior years and creates of his own free will this gorgeous apparent income, an actual income of the Maine Company so that a revenue agent may come around and say to him, "Ah, look, see this big income not declared out in dividends. You are cheating, Mr. Prince."

And so I say that the Exhibit 40 is a record of the fact that Mr. Prince couldn't have had any such intention. If he wanted to do what is complained of, it would have been so simple to do it simply by an action to let the money lie down in the lower levels.

And then once more Mr. Prince's intention was made clear when he was on the stand, and I am not referring, if Your Honor please, to the stereotyped answer to my usual question: "Did you intend to"—which the witness answers "No." I don't think such an answer particularly moving.

I suppose any taxpayer is apt to answer that stereotyped question that way, but I had the pleasure of asking Mr. Prince at the end of his testimony just what his intention was through the years, and I think the only disappointment that I have in the case is that the written record is so faint and so feeble in recording what happens in a court room. I don't need to remind Your Honor of it. You sat and heard it. But I would like to say his words over again when I asked him the question.

"Why, sir," he began, "Why, sir, I recognized as a man that had many years of experience in finance the obligations that I had before me to pay in 1939 and '40. I kept that continually before me. I recognized the responsibility that I had in carrying on that industry and in the association I had with the men who had been with me all my life to see that nothing happened to it. I used the best judgment I could to be conservative. Through all the troubles that we have had and the uncertainty, I tried to hold my ship to its course."

And even in this feeble way, I am glad to put it into the record, the fact that as I saw it and as I heard it, there was a little break in his voice, and that old man sort of drooped his head with the thought that he hated to think that he might somewhere have failed to hold his ship to his course. Now, what was that course to which he had been holding the ship? It is the course that had been marked out all through the years beginning in 1911, beginning with the purchase of New Jersey stock, his talks to Mr. McDonough, who is in the court room, his talks to Reimers, his talks to Mr. Leonard, his bank crisis, the levels on which the subordinated funds were deposited, all kinds of landmarks all along the way. That marked that man's course. I think all of us in this court room know that if Mr. Prince spoke the plain truth as he stood there and as we now know his

true reason for what he did, and that is his reason, this case is at an end.

Now, just one word about what he did in saving up to pay those debts. We may think, if we wish, that he was conservative. We may think that he was cautious. We may think, if we wish, that he was frightened in those bad years through that depression. But is there, I wonder, any one in the court room who thinks it was unreasonable—was it just plumb over, Mr. Clark, on the unreasonable side to keep his eyes fixed on that debt, as he said, "I kept that continually before me," and to plan for it and to save for it? I can't believe that that conduct was unreasonable.

One little thing I must mention—(After conferring with Mr. Green). I think I will mention to Your Honor this point of argument, Mr. Green, who is usually wiser than I, says I should save for rebuttal, and, apparently, I will have about ten minutes, and I think I shall.

Then just one last thing—

The Member: Will you tell me one thing, as to whether you think or as to whether you can say anything about a possible difference in the interpretation of the word "reasonable" when it is applied to the phrase "needs of the business" and the word "reasonable" as it is applied to the subjective thoughts of men; that is to say, beyond the reasonable needs of the business, are you necessarily importing a question as to the reasonable judgment of a man?

Mr. Welch: If Your Honor please, I think that must be so, because the tax is imposed because of an intention. Mr. Prince must have had, what the cases have called, a nefarious intention. Now, if the accumulations are unreasonable accumulations, they may be an indication of that intention. Now, Mr. Prince is the man at the one hand whose intention we are speaking for. Mr. Prince is at the other end, who, as a director, accumulates the funds, and I should

say that it is his conduct that is being tested, and that his conduct in accumulating funds must be unreasonable to test his conduct, and we do not think so much of the needs of the business in the abstract as unreasonable as we think of his conduct, because in the end it is this man's mind we are judging.

The Member: First, is it possible to interpret the statute, the statutory language, "beyond the reasonable needs of the business," that it is being the subject of a subjective test, regardless of the particular soundness of the judgment of the subjective test of the judgment of any one man.

I do not suggest that you deal with it now if you are not prepared. I will leave that for your consideration.

Mr. Welch: No. I think I will deal as best I can with anything Your Honor suggests.

The Member: Very well.

Mr. Welch: If you take the phrase "reasonable needs of the business" as meaning something that applies to plant, equipment, bank balances, and accumulations, and so forth, the needs of a business can't be translated into human activity except through the minds of men. The needs of a business, I take it, must be what the board of directors reasonably thinks its needs are. They may be other needs than that but they must always, at least, be that. If three of us in the room sit in a board of directors and were unanimous that this company needs, let us say, $1,000, I take it that is the need of the business. Now, if we are foolish and underestimate the needs of the business, through some clerical error, and we actually need $2,000, all right. We had a need of something short of what we thought; but, I take it, as you move in the realm of human relations, the best we can say in a court room of this character is that the needs of a business must be what its board of directors

reasonably think are its needs. And so I think in the end you come back pretty close to the standard of individual men.

I doubt somewhat the validity of what I am now about to say to you, but I do not want to sit down without saying it. Some one very much wiser than I am a long time ago said, "The power to tax is the power to destroy." And another man also very much wiser than I, in the Supreme Court, dissenting opinion, said, "Not so long as this court sits."

But I don't think I would be doing my duty to my client without indicating the gravity of the situation that would confront this company if this tax were imposed, and, secondly, the personal property tax of the New Jersey Company, of which there is not too much but some evidence, and if the tax of the personal holding company were imposed, which was put in evidence this morning—that is to say, the notice of the deficiency between now and 1946.

I do not know how valid the argument is, but I thought I had rather not sit down without saying to Your Honor that after a long study of this case I have reached the studied opinion that if all the taxes in this case now facing this company are actually imposed and collected, I believe this great industry will be broken up and that Mr. Prince will in the end have failed to hold his ship to its course.

Mr. Clark: May I ask Your Honor if I may have a few minutes' recess before I start?

The Member: Yes.

Mr. Clark: Just two or three minutes.

The Member: Very well.

(There was a short recess taken.)

Argument on Behalf of the Respondent.

Mr. Clark: I may seem a bit stilted in argument, Your Honor. I am going to try to keep very close to what I con-

sider are the essential points of the Respondent and do not intend to elaborate as I might in brief subsequently.

As I stated yesterday, Respondent was relying on all the provisions of section 104, except that the corporation was formed for the prohibited purpose.

Now, the deficiency notice specifically states that the corporation is subject to taxation under 104 of the Revenue Acts from 1928 to 1932.

Section 104, subsection (a), provides that if a corporation is formed or availed of for the purpose of evading imposition of a surtax upon its stockholders and allows gains and profits to accumulate instead of being divided or distributed, there would be levied 50 percent tax.

Subsection (a) is so enforceable independent of subsection (b).

Subsection (b) of the Act states that if a corporation is a mere holding or investment company or has accumulated its surplus beyond the reasonable needs of the business, then that is prima facie evidence to evade surtax.

Respondent relies on both subsection (a) and subsection (b) of 104.

Now, I have here, Your Honor, citations of a number of cases which have been decided in favor of the Government relative to section 104. I do not know whether Your Honor cares to have those read into the record or have them referred to in brief.

The Member: I don't care one way or the other.

Mr. Clark: I notice that in this amendment to Rule 35, of which I was totally unaware until yesterday afternoon, there was something about citations as well as argument. That is the reason I am mentioning this. I can read these in at this time.

The Member: I will be glad to hear what the cases are on which you rely.

Mr. Clark: Yes; I can state the cases; I cannot analyze them at this time.

Helvering v. *National Grocery Company*, 304 U. S. 282; *Williams Investment Company* v. *United States* (Ct. Cls. 1933) 3 Fed. Supp. 225; *United Business Corporation of America*, C. C. A. 2, 1933, 62 Fed. 2d 754; *Keck Investment Company* v. *Commissioner*, 1935, C. C. A., for the Ninth, 77 Fed. 2d 244; *A. B. Sanger, Inc.*, v. *Commissioner*, 1936 C. C. A. Fifth, 84 Fed.—must be Fed. 2d, of course—23; *Almours Securities, Inc.*, v. *Commissioner*, 1937 C. C. A. 3, 91 Fed. 2d. 427; *R. & L. Inc.*, v. *Commissioner*, 1936 C. C. A. 5, 84 Fed. 2d. 721; *deMille Productions*—I believe that is *Cecil deMille Productions*—

The Member: I think you are mistaken. I think that is William C. deMille.

Mr. Clark: I think you are right. In fact, I am sure you are right.

(Continuing)—1934, 30 B. T. A. 826; *Edward G. Swartz, Inc.*, 1935, 33 B. T. A. 355; *Rands, Inc.*, 1936, 34 B. T. A. 1094; *Nipoch Corporation*, 1937, 36 B. T. A. 662; *United Business Corporation of America*, 1935, 33 B. T. A. 83; *Reynard Corporation*, 1938, 37 B. T. A. No. 83.

Respondent's position is taken under the deficiency notice primarily on the grounds stated in (b) of 104. I believe that Mr. Pierson will have something to say about (a). I do not think that I have anything particularly to comment with regard to that.

It is Respondent's position that this was a mere holding company, and also that there was an accumulation of gains and profits beyond the reasonable needs of the business.

Relative to the first, as to whether it was a mere holding company, I would direct Your Honor's attention to the testimony, the exhibits, which show that the Petitioner was

formed in 1911 to acquire the capital stock of the New Jersey Company, which in turn—it was a holding company admittedly, and I understand it is admitted by Petitioner that Petitioner is a holding company. In any event the company whose stock Petitioner was formed to acquire was a holding company. That was in accordance with the plan of 1911. I haven't that exhibit number, but Your Honor is familiar with the facts in the record. With a guarantee of a fixed dividend rate on the common stock of the Jersey Company outstanding in the hands of the public.

Now, after the formation of Petitioner it continued to acquire the stock of the New Jersey Company, and it is Respondent's position that it exercised no other function besides the acquiring and holding other securities and making loans to its stockholder, Mr. F. H. Prince, who was for a part of the period here involved its sole stockholder, but throughout a large stockholder. Now, this, in Respondent's opinion, brings the Petitioner in the category of a mere holding company.

Throughout the years involved it had no managing staff or expenses incident thereto which would give any evidence of operating activities. The Petitioner has offered evidence to the effect that Mr. Prince, as president of the Maine Company, issued orders as to the conduct of the entire enterprise, whereas the consolidated returns of the New Jersey Company and its affiliates in the years in question show that he spent all of his time in conducting the activities of the New Jersey Company and its subsidiaries during the years and received substantial compensation therefor from these enterprises.

Now, passing to the question of the undue accumulation of gains and profits—

The Member: Mr. Clark, let me ask you one thing.

Mr. Clark: Yes, sir.

The Member: You dealt with the question that it was admitted that it was not formed for the purpose stated in 1911. I would like to know whether, since the Government, as I understand it, does contend that this corporation was during the taxable years availed of for the purpose as set forth in subdivision (a),—I would like to know whether the Government has formed an opinion as to when the purpose—it says it was availed of in the taxable years here in question, came into its history since it was not formed for that purpose; that is to say, there must have been a time between the early years when it was formed for some other purpose and the taxable years when it is said to have been availed of for the condemned purpose, when the purpose changed so as to bring it within the statute. Did it change only in the taxable year 1930, or was it in the taxable year availed of, as it had been availed of for years before, and, if so, when?

Mr. Clark: Well, I cannot point Your Honor to the precise year, but I would say unquestionably it was availed of prior to the taxable years, in this regard, at least—that is, loans to Mr. Prince, who was its stockholder during those years. That had been going on for years. I haven't the precise figures.

The Member: Well, that answers my—that is, the earmark of the applicability of the term "availed of" is the fact of loans made to its principal or sole shareholder, so that whenever that began the Government's position is that at that time there began the period when this corporation was availed of for the condemned purpose. Is that the idea?

Mr. Clark: Yes, sir.

Turning now to the matter of undue accumulation of profits and gains beyond the reasonable needs of the business: Throughout its existence and through the year 1933 the Petitioner had accumulated a surplus of approximately

27 million dollars on the paid-in capital of one million dollars, while paying dividends in a total amount of—well, in round figures—$6,350,000. During the taxable years here involved it had net income, in 1930,—and these again are in round figures,—of $2,968,000; in 1932, $2,172,000; in 1933, $2,243,000; and paid dividends of only $400,000 in each of these years. The cash balances were in none of these years less than $7,645,000. Mr. Prince's aggregated indebtedness to the Petitioner for the borrowings of cash and securities were, on December 31, 1930, $3,307,000; on December 31, 1932, $3,797,000; and on December 31, 1933, $5,100,000,—these again being in round figures.

In this connection, I would invite the attention of the Board to the National Grocery Company decision by the Supreme Court. In the course of the opinion it stated, referring to Mr. Cole: "He needed personally further sums and took these in the form of loans. In the tax year Cole borrowed from the corporation $140,000. His aggregate indebtedness in January 31, 1931, for borrowings during the seven years was $610,000. As was stated in United Business Corporation v. Commissioner, Supra, page 755, 'These loans are incompatible with the purpose to strengthen the financial position of the Petitioner, but entirely in accord with the testimony to get the equivalent of dividends under another guise.'"

In 1934,—and I refer to that because there has been so much conversation relative to this crisis in 1940,—in 1934 Mr. Prince borrowed an additional $850,000, in spite of all this discussion that has been had relative to that crisis in this country.

Now, the Respondent recognizes that the New Jersey Company and its affiliates has outstanding bond obligations maturing at dates subsequent to the taxable years, and that is in 1940, and also in 1945, I believe. A large amount of

this is the obligation of the New Jersey Company, which is admittedly a holding company, with no business purpose whatsoever.

The Petitioner could have partially liquidated the bonds of the New Jersey Company at prices below their face value, as the evidence shows, but did not do so. Petitioner also used its accumulated gains and profits in the purchase of miscellaneous securities which were wholly unrelated to the Stock Yards enterprise rather than in purchasing the bonds of the New Jersey Company and its affiliates, or distributing whatever earnings there were to the stockholder.

Now, so far as the Maine Company is concerned with relation to the bonds of the New Jersey Company, I wish to call Your Honor's attention to the fact that all liability for payment of the principal of the bonds of the New Jersey Company and its affiliates was specifically disclaimed by the Maine Company by the terms of the contract of October 1, 1914, which is the contract between the New Jersey Company and the Maine Company, and is Exhibit S-46 attached to the stipulation of facts, and I should like Your Honor's indulgence to read a portion thereof.

I am referring, as I say, to Exhibit S-46, attached to the stipulation, to page 4 thereof, and specifically to subsections (b), (c), and (d) under the No. 1, which is the paragraph number on that page. Reading, beginning at (b)—pardon me, I will start with paragraph 1.

"The Maine Company hereby guarantees to the New Jersey Company the prompt payment of the following."

Now, subsection (a), I think, I may pass as immaterial to this point.

Subsection (b): "The interest upon the said Five Percent Collateral Trust Gold Bonds and the said Four Percent Forty Year Mortgage and Collateral Trust and Refunding

Gold Bonds when and as the same becomes due and payable and the Maine Company further agrees to make the payments and to fulfill all of the obligations of the New Jersey Company under the mortgages and deeds of trust securing the said bonds except the payment of the principal of the said bonds.

"(c): All payments which the New Jersey Company may be required to make under and in accordance with Article 6 section 3 of the said mortgage and deed of trust from John A. Spoor, Frederick S. Winston, and the New Jersey Company to the Standard Trust Company of New York dated 1st March, 1908, and all other payments other than the principal of the said first mortgage Five Percent Twenty Year Real Estate Improvement Bonds which the New Jersey Company may be required to make under and in accordance with the covenants contained in the said mortgage to be performed by the New Jersey Company.

"(d): All payments which the New Jersey Company may be required to make by virtue of its guarantee of the interest but not of the principal of the said $2,327,000 First Mortgage Four Percent Forty Year Gold Bonds of the Chicago Junction Railroad Company."

Now, from 1917 to 1933 the Petitioner accumulated huge surplus, and it is the Respondent's position that this accumulation was for the purpose of preventing the imposition of surtax on its stockholders.

And now I had passed for the moment to something which would fall under subsection (a) of 104 rather than (b). I had forgotten that I was to make no comment on that.

In the years 1930, 1932, and 1933 the stockholders would have been liable for additional surtaxes if the entire gains or profits had been distributed in the amount of $2,479,000, approximately.

Respondent admits that the purchase of securities by Petitioner from F. H. Prince, thereby enabling him to do, as he did, deduct large losses on his individual income tax returns definitely brings the Petitioner within the scope of subsection (a) of 104 for the reason that the Petitioner's gains or profits were accumulated and used by Petitioner to prevent the imposition of surtax or any internal revenue tax upon its stockholder.

The Member: Mr. Clark, I don't think I understand that. The failure to distribute enabled Prince to deduct large losses, you say. Is that right?

Mr. Clark: Yes, Your Honor.

The Member: I don't understand that.

Mr. Clark: Well, now, I will tell you, Mr. Pierson has something to add at this point, and, as I say, I had not anticipated to go into subsection (a) myself. Perhaps if Your Honor will indulge me I will leave it to him to take that up.

The Member: I want to understand you as you go along.

Mr. Clark: Yes, because I have nothing further to say.

The Member: Mr. Pierson.

Mr. Pierson: If Your Honor please, in that regard I can probably state it more succinctly in this way: The corporations' gains or profits are allowed to accumulate, they stand in the corporation as such, they take those gains or profits and purchase securities from their sole stockholder, that is, using these gains and profits to purchase those securities from the sole stockholder, upon which the sole stockholder deducts a loss in his individual income tax return. Now, it seems to me that that is using the corporation for the prohibited purpose, it allows its surplus to accumulate and then takes its surplus and buys securities from F. H. Prince, and he takes losses on his income tax return.

Mr. Clark: That concludes the Respondent's statement.

The Member: Is that all you have to say? I understand that is your answer to my question. Is that all your argument?

Mr. Pierson: Yes, Your Honor.

Mr. Welch: I think I have about 10 minutes available.

The Member: Yes, sir.

Mr. Welch: The section of the argument that I reserved, thinking that the subject might be brought up by my brother, was a short section, that of dealing with the loans by this corporation from F. H. Prince & Company, and I would like, in turn, once more, at the risk of boring Your Honor, to read what my brother read from the National Grocery Company case v. Helvering.

"He needed personally further sums"—meaning Cole needed—"he needed personally further sums and took these in the form of loans. In the tax year Cole borrowed from the corporation $140,000. His aggregate indebtedness in January 31, 1931, for borrowings during the seven years was $610,000."

Now, the significance of a loan by a corporation to a stockholder is found in those words "he needed personally." And I have always thought that the loans in the Grocery case, as we call it, must have been the thing that left this Board no alternative.

But I would like to compare the loans in this case with the loans in the Grocery case. I have no doubt Your Honor has them well in mind. They were regular loans. They came year by year. No interest was ever paid on them. They had no security. And while Your Honor did not go that way, I can understand a Member of the Board saying: "They look too much to me like dividends in the form of loans. I don't like it." But compare them to the loans in

this case. Did Mr. Prince need that money personally? Oh, no. The need was the need of the Maine Company to have someone friendly to it buy the Armour & Company and stop the threatened practice of diverting shipments from that great market, to the injury of the market, the farms that patronized it, and Armour & Company itself, in the end. Mr. Prince did not get that money and spend it for champagne or for luxury. That loan was devoted absolutely to the purposes of the company, and it loses all significance of whatever sort when you see, as the evidence shows, what the purpose was. Similarly, the series of loans of $2,300,000 in the Armour transaction.

There is, however, one little blemish on my case, and except for that one little blemish I think it is a truly beautiful case.

I suppose that I must say that Mr. Prince needed $160,000 to buy the Newport house. I hate to say it because way down underneath I don't think it is true, but he took that sum—he took that loan from the Maine Company temporarily until he sold his old home Princemere to repay it. Now, it wasn't like the loans in the Grocery case, unsecured. It wasn't like the loans in the Grocery case, free of interest. It wasn't like the loans in the Grocery case, one of a long series, year by year, which made it look as if Mr. Koch was living on his loans. It was this sporadic temporary one, only secured and paying interest.

But I do say I think it is a little blemish on my otherwise beautiful case. The first expert for the Government, I thought, took care of that. I think Your Honor has the question in mind that I put to him, and he said to me quickly that the figures in this case were so large that the sums of $160,000 no matter where found could not actually be said to be a truly significant item. And so I say I have my little blemish. One never sees the perfect lawsuit else

they wouldn't come into court, but since it is sporadic, since it was intended to be temporary, since interest was paid on it, and since the Government's own witness said it was an insignificant figure, I sit down with some confidence, saying that I admit my little blemish, but I think that it is trivial and insignificant.

The Member: You both know what the rule provides as to the time for submission of briefs?

Mr. Clark: I understand from the revision of the rules, of which copies I got last night, that each side is given 45 days under the rule.

The Member: That is right.

Mr. Clark: Now, I wonder if we can't have a little more time on this case, Your Honor.

The Member: You can if you need it. I may say this—

Mr. Clark: I don't want to delay—

The Member: Division No. 10, of which I happen to be the entire membership, is fairly current in its decision of the cases that are under submission. We are waiting now mostly for Government briefs in the cases in order to be able to decide them, and that being so, I want to delay as little as possible.

Mr. Clark: Yes, sir.

The Member: That is to say, as little as possible consistent with a good job on the part of Counsel because after all the function of the briefs is to assist the harassed Member in arriving at a conclusion from a voluminous record. That is what I want briefs to be filed for, and I want them filed as well as they can be for that purpose, and you may have all the time that that requires provided I can be assured that you take no more than that.

Mr. Clark: Well, I will tell Your Honor what I am sure you will appreciate. Under circumstances as they were

prior to the first of the year, I could tell pretty well where I was going. At the present time, however, and beginning with the first of the year, Mr. Pierson went to Cincinnati. I went to Detroit. We each have to return to our post of duty. What arrangements we can make—I say "can make"—what arrangements we may make with reference to working together with Mr. King, who is also assigned in Detroit, when we must have access to the exhibits which have been filed here, and I refer to our own exhibits largely, the income tax returns, because the Petitioner has very kindly furnished us with copies of the exhibits they filed. I don't know but it is due to that factor and the uncertainty connected therewith that I make that suggestion.

Now, I am just wondering how long I ought to ask for, and I do not want to impose on the Board in that regard. I am sure you appreciate that.

(Counsel for Respondent confer.)

Mr. Clark: Well, Your Honor, all I can say at the moment is this: We will have to discuss the matter with the assistant head of the Appeals Division to see what arrangement can be made in that regard. Now, I don't know whether to suggest that we be granted 60 days at this time with a privilege to move for some reasonable further time, if necessary—I am afraid that that is what I will have to do because I don't know. I will have to talk with him about that.

Is there any objection on the part of Counsel for Petitioner to that?

Mr. Welch: I am torn between two things. I don't think it is out of order to say that a decision in this case reasonably in the near future one way or the other would be welcome. Some cases have been held in the Board for many, many months, and that will be awkward here. On the other

hand, Mr. Green and I are anxious to go away, as I said this morning, in your absence, so that my personal desires are in conflict with those of my client, and my client, in substance, is in the room and hears me confess it.

I should prefer a fixed date and no asking for extension, and I would think, take a somewhat longer period than you suggest provided it was fixed, either 10 or 15 days more, if you felt that you should have it, Mr. Clark.

The Member: I may say that the difficulty that we have had is that no matter how fixed a date is, it seems to be fixed on shifting sands, because when the due date arrives, it is immediately the action of one party or the other, and it is usually the Respondent, as Mr. Clark well knows, who postpones the fixed date by failure to file, and so we have to wait.

Now, after all, one of the difficulties of the nature of this Board is that it can't require anybody to do anything. If we say that the time is fixed, we are speaking only hopefully. We can't enforce it.

I would like to have assurance, and I suppose that the nature of the tremendously large organization such as the Government has in these cases, there may be as much as I can get now an assurance that whatever date is fixed will be the date upon which I can find a brief filed with the clerk so that I can get to work on it. I can only express hope.

Mr. Clark: I will tell Your Honor what my thought is. Whether I can carry it through, I don't know. My thought is that Mr. Pierson and Mr. King and I should come back here to Washington and work here on the brief at some reasonably near date in the future. If permission for that is granted, we will be in a different position from that occupied by us when we were permanently located here because we won't have anything else to do, and we can get right down to business without interruptions on a whole lot of

details which always delays work on briefs, as I have known for years, and that Your Honor is aware of.

The Member: One of the other things that delays work is the statement almost always iterated and reiterated that we have to wait two weeks for the Stenographer's minutes. We got daily copy in this case, and here are the Stenographer's minutes, which I am holding aloft in the court room. So that factor is out.

Mr. Clark: Of course, this is a very substantial case.

The Member: Yes.

Mr. Clark: The record is substantial and exhibits are numerous. I believe that I would suggest 3 months, if that is agreeable to Your Honor.

The Member: Now, Mr. Welch, what do you say to that?

Mr. Welch: I observed a violent signal from the back of the room from my client, who reminds me constantly that in the sad event of loss, we have tremendous interest to pay. That sounds like too much time.

The Member: I was surprised that nobody mentioned that before. But if the Government is entitled to this deficiency it will get interest. If the Government is not entitled to this deficiency, Petitioner is saved interest. And in either event, the amount is large, so that I suppose a month is a long period of time over which to calculate whether you are going to pay or save interest. So that is a factor. But, after all, you gentlemen are the ones who are interested. I will decide this case just as promptly as it is submitted to me, and I will leave it to you to say when it shall be submitted.

Three months has been suggested. What do I hear in response to that?

Mr. Welch: Sixty days seems to be the maximum. I don't suppose Your Honor would wish to take it without briefs?

I would be glad to submit it on the oral argument, myself. I have little confidence in briefs on facts.

The Member: If I had more self-confidence I might take it that way, but I feel no assurance in these cases, and I need the assistance of able counsel on both sides to promote the interests of their respective sides, and tell me why I should be persuaded in their behalf.

Mr. Welch: I cannot go beyond sixty days.

The Member: I should think that sixty days would be as much as they should be asked to give.

That will be suppose we say April 17th, which is Monday. That means, according to the new rule, that the briefs of both sides shall be filed at that time, and in view of the underlying purpose of that provision of the new rule, I shall direct the clerk that the briefs shall not be served upon the opposing side until both briefs are filed. After the briefs are filed and served the both sides will have, contrary to the rule, 20 days within which to file their respective replies.

The Clerk: Twenty days instead of the fifteen prescribed?

The Member: That is right.

Thereupon, the proceedings will stand submitted.

The case is thus closed.

(Hearing concluded.)